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Supreme Court of the United States

OCTOBER TERM, 1947

No. 84

UNIVERSAL PICTURES COMPANY INC. (sued herein as Universal Corporation and Universal Pictures Company Inc.), UNIVERSAL FILM EXCHANGES INC., and BIG U FILM EXCHANGE, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

No. 79

THE UNITED STATES OF AMERICA,

Appellant,

vs.

PARAMOUNT PICTURES INC., *et al.*,

APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR UNIVERSAL PICTURES COMPANY, INC., *ET AL.*, APPELLANTS

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Opinion Below

The case below is reported in 66 Fed. Supp. 323 and 70 Fed. Supp. 53 (R. 3504; 3659-3702).

Jurisdiction

The jurisdiction of this Court to review by direct appeal the judgment and decree entered in this cause is conferred by Sec. 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 572; 15

U. S. C. Sec. 29), and Sec. 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. Sec. 345).

Probable jurisdiction was noted by this Court on June 23, 1947.

The Statutes Involved

The United States Statute under which the case was prosecuted was the Sherman Anti-Trust Act (Sections 1, 2 and 4, Act of July 2, 1890, 26 Stat. 209, as amended; 15 U. S. C. A., Sections 1, 2 and 4; 4 F. C. A., Title 15, Sections 1, 2 and 4), the pertinent provisions of which are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *"
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *"
>
> "Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

Also directly involved is the Copyright Act of March 4, 1909 (35 Stat. Part 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. Part 1, pp. 488-490), U. S. C. A. Title 17, and particularly that portion thereof which reads as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a non-dramatic work; * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever;

* * * *

Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: * * *

(l) Motion-picture photoplays;

(m) Motion pictures other than photoplays: * * *

Statement

These are appeals (R. 3788) from a final decree (R. 3694) of a Statutory Court in and for the Southern District of New York, in a proceeding in equity (R. 3137) brought by the United States under Sec. 4 of the Sherman Anti-Trust Act, to enjoin five corporations, which, taken with their subsidiaries, are completely integrated businesses, and are the largest factors in all three branches of the motion picture business, i.e., production, distribution and exhibition, as well as the three corporations, which, taken with their subsidiaries, are next in line in respect of size, but are much smaller (pp. 15-20, *post*) and are not engaged in the exhibition business (G. X.* 146, F.F. ** 58, R. 3670).

The five largest defendants, together with their subsidiaries, will be referred to herein as Paramount, Loew's, RKO, Warner's and Fox, or collectively as the "major defendants" or "the producer-distributor-exhibitor defendants" or "the Big 5."

The three medium-sized corporations, taken with their subsidiaries, are not fully integrated, in that they have no theatre interests, but merely produce and/or distribute motion pictures (G. X. 146; pp. 19-20, *post*). The Universal appellants are in this category. They are completely independent of the other defendants, having no interlocking directors or officers or ties through security ownership (R. 215-217). The other such defendants are United Artists and Columbia. These three are collectively referred to herein, as they were upon the trial, as the "minor defendants", or the "little three".

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*Government exhibits are thus designated.
**Findings of Fact are thus designated.

Violation of Sections 1 and 2 of the Sherman Act were originally charged in respect of production, distribution and exhibition, but the charges in respect of production were abandoned (Government's Jurisdictional Statement,* p. 8).

1. The motion picture theatre.

There are over 18,000 motion picture theatres in the United States (F. F. 118, R. 3684). They may be broadly divided, in respect of function, into (1) first-run theatres, and (2) subsequent-run theatres. If affiliated with the major defendants, they are known as "affiliated theatres". If not so affiliated, as "independent theatres" or "independent circuit theatres".

First-run theatres qualify as such because they are the best-equipped, largest, best-located, best-managed, have the most responsible operators, and are most suitable for the first exhibition of the best feature pictures (R. 419-20, 702-3, 1510-11, 1697-1700, 1901-2, 2043-4). They are of the most importance, of course, when strategically located in the large metropolitan centers with the best box office potentialities (R. 1634-8, 1644-8).

It is in the first-run theatres that those feature motion pictures which are deemed to be of the best quality, in that they promise to be the best revenue-producers, are first shown (R. 561, 1698, 1907). In the 1943-44 season the number of high revenue-producing pictures ran from 100 to 150 at the most (G. X. 426).

The highest admission prices are, of course, charged to view such pictures in such theatres (R. 419, 1091, 1901-2).

The total number of first-run theatres does not appear in the record, but in 1945 there were approximately 522

*Hereinafter sometimes referred to as Gov. Juris. St. or G. J. S.

thereof in the 92 cities over 100,000 population in the United States, of which some three-fifths were affiliated with the major defendants, and the rest independent (Ex. L-13). In 38 of these cities there were no independent first-run theatres. In 4 there were no affiliated first-run theatres, and in 50 there was competition between affiliated and independent theatres (Ex. L-13). In these 50 cities Universal licensed independent first-runs nearly as often as it did affiliated first-runs* (Ex. U. 1).

There are numerous classes of subsequent-run theatres, exhibitions in which follow in order after those in the prior-runs, with clearance intervals of varying length in between. These clearance intervals give the prior-runs protection in respect of their exclusive rights. During such intervals the subsequent runs, which obtain without cost the benefit of the advertising and exploitation engaged in by the prior-runs, may further advertise and exploit the pictures which they will later show. Second-run theatres, generally speaking, are the second-best theatres. They charge the next highest admission prices. The succession may continue down as far as the seventh or eighth runs, or even further. These are the poorest theatres which charge the lowest admission prices (R. 416, 706-7, 1901-2, 1907-8).

A great many of the 18,000 motion picture theatres in the United States are grouped in circuits under common ownership and/or management (R. 738). The Amended and Supplemental Complaint (para. 17, R. 3145) defines a "circuit theatre" as a member of a "theatre circuit", which

*There was no showing whatsoever that in any of the cities in which Universal licensed the affiliated first-runs in preference to the independents, the latter should have been licensed "on the merits", because possessing better or more effectively operated theatres.

in turn is defined as "a group of more than five theatres, owned, controlled or managed by the same person, partnership or corporation; or a group of more than five theatres which combine with each other, through a common agent, in licensing film". An "independent theatre" is defined as any theatre which is not a member of a "theatre circuit".

2. The feature motion picture.

This case has to do with the licensing and exhibition of feature motion pictures, all of which are copyrighted (R. 658-9, 1460). Upon the Government's concession that the licensing and exhibition of "shorts", and "newsreels" was an unimportant part of the business, evidence in connection therewith was excluded (R. 190-196). Any motion picture which is over 4,000 feet in length is termed a feature motion picture, as contrasted with a "short", "newsreel", etc. (F. F. 1, R. 3660).

The cost of producing feature motion pictures ranges from a few hundred thousand dollars to several million dollars (R. 625-6, 672, 1895). Some types of feature motion pictures, such as the so-called "Westerns" (i.e., adventure or action pictures, so named because often dealing with activities in the Western part of the United States) are made at comparatively low cost. These are shown in the lower-class motion picture theatres (R. 1698, 910-11).

Features are classified by distributors as "top bracket", "second bracket", "third bracket", "fourth bracket" and "fifth bracket", depending upon their expected ability to draw at the box office as measured by test runs (R. 429).

Many theatres exhibit two features, often a high-bracket picture and a low-bracket picture, upon a program, and this is known as "double-featuring" (R. 1277, 1293).

Universal and Columbia, and Republic, Monogram and P. R. C., the three principal non-defendant national distributors, have specialized in producing lower-bracket features or program pictures (G. X. 426, 427), many of which are used as the second pictures in double-featuring (R. 1293-8, 1300-1, 1495, 543-6, 873-4, 910-11), instead of following the major defendants in producing mainly high and medium-bracket features. Thus out of an average of 45 to 50 feature pictures a year (exclusive of Westerns) produced and/or distributed by Universal (R. 1457), it was able to obtain a percentage of the gross receipts on an average of only ten (R. 1495). This is the usual method of licensing quality pictures (R. 430-1).

Many of the problems of the industry are due to the fact that quality feature pictures,* which are the money-makers, are in short supply relative to demand (R. 971, 1753-4). One of the principal reasons for this is the cost of producing such quality feature motion pictures. This runs as high as $3,500,000 (R. 625-6, 672, 1895), and the cost of producing feature pictures has increased to from 2 to 2½ times of what it was in 1937-8 (R. 625-6). If a motion picture theatre changes its program only once a week, but operates on a double-feature policy, it will require 104 feature pictures a year. If it changes its program two or three times a week, as a great many theatres do, it will require 208 or 312 feature pictures a year. Some theatres, indeed, change their programs every day (R. 1275, 1277, 1303).

The Government's interrogatories and requests for admissions were directed to two motion-picture seasons, to

*In its brief in *Schine Chain Theatres Inc.* v. *U. S.*, argued at this Term, the Government conceded that there was no scarcity in "inferior" films (p 45).

wit, September 1, 1936—August 31, 1937, which was the last season before the Petition was filed (July 20, 1938), and the season of 1943-44. The case was tried on an Amended and Supplemental Complaint filed November 14, 1940. Hence we are primarily, if not exclusively, concerned with conditions prior to the latter date. During the 1936-37 season there were 101 feature pictures in the three highest brackets released by the eight defendant distributors, of which Universal released only 4, all in the third bracket (G. X. 427). During the 1943-44 season, these eight distributors released 140 features in the three highest brackets, of which 99 were in the two highest brackets. No Universal picture was in the highest bracket, and it had nearly twice as many in the two lowest brackets as in the second and third highest brackets (G. X. 426).

Thus whenever two or more first-run theatres were in competition, as was usual in important situations, the demand for the limited number of successful pictures was bound to be great. Though the number of lower-bracket features released by the eight distributor defendants has been 3 to 5 times as many as top-bracket features, the top-bracket features collectively produce several times as much at the box office in the aggregate as do the much more numerous lower-bracket features (G. X. 426).

Prior to the filing on November 14, 1940, of the Amended and Supplemental Complaint, upon which the case was tried, the production and distribution of quality feature pictures, as among the eight distributor defendants, was almost completely in the hands of the "big five", except that United Artists distributed a substantial number thereof on behalf of independent producers (G. X. 427). During the season preceding the trial, although there had been some improvement in the quality

of their pictures, it still remained true that Universal and Columbia had few pictures in the higher revenue-producing brackets, whereas most of the feature pictures produced and distributed by the "big five" were, even more emphatically, in such brackets (G. X. 426).

3. The first-run theatre as a show-window for quality feature pictures.

The box-office success of a feature picture which has cost a great deal to make depends upon the kind of exploitation it gets in the important first-run theatres in the larger cities. If a pictures does well in such theatres, it has long runs therein, and its prestige becomes established throughout the country, because people who have seen the picture talk about it, and the gross receipts are published in the trade papers and picked up all over the country by exhibitors (R. 654, 1515, 1624-7, 1646-8, 1634-8, 443-4). Thus the over-all success of a feature picture is mainly dependent upon the length of its runs in the first run houses.

In order to properly exploit a picture in the first and subsequent-run theatres, extensive national and local advertising is employed. The important pictures are the only ones which are extensively advertised nationally (R. 678-81, 1624-7).

In order to obtain proper exploitation in the first-runs, stable relationships* between the distributor and exhibitor are necessary to obtain proper cooperation in advertising

*The Government's claim that our relationships with affiliated theatres in the larger cities were wholly stable during a four-year period is not borne out by the evidence (G. X. 147), which only shows that they were "for the most part" stable. Since such theatres were among our best customers, and only very infrequently would a better one, independently operated, come along, shifts initiated by us could hardly be expected.

and other matters necessary to the best exploitation (R. 1986-90, 2110, 1700-2, 1391).

4. The Government's complaint.*

(a) THE BASIC COMPLAINT.

The Government's basic complaint in this proceeding is that unreasonable restrictions of interstate commerce, in respect of admission prices, and in the granting of prior exhibition rights, detrimental to the public and/or to the small independent exhibitors, who were the competitors of the affiliated theatres in which the major defendants were interested, were imposed by the major defendants, through the exertion of monopolistic power flowing from their control of first-run theatres in most of the important domestic situations, particularly in the metropolitan centres, supplemented by their control of the great preponderance of the best revenue-producing feature pictures. Government's Closing Argument, R. 2546-2579, particularly R. 2576, 2556, 2549, 2547; Gov. Juris. Statement, pp. 7-8 (para. 2, 3, 5, 6), 17-19; Gov. brief in No. 79, page 131.** In companion cases argued at this term, *Schine Chain Theatres, Inc. et al.* v. *U. S.* and *U. S.* v. *Griffith Amusement Co. et al.*, the Government argued that large independent theatre chains had restrained and monopolized interstate com-

*Amended and Supplemental Complaint, para. 105, 124-5, 128, 129-132, 146, 150-165, 170-7, 178, 179, 180-8; R. 3137 *et seq.*; Government's Opening Statement, R. 5-32; Government's Jurisdictional Statement, pp. 3-4, 7-8, 17-23; Opinion, R. 3505-3511, 3549-50; Government's Closing Arguments, R. 2547-2602.

**"The major defendants as distributors have collectively controlled and still control the major part of the first-class film supply, which enables them to set a pattern of run priority to which other distributors conformed in selling in any market in which the defendants' theatres are located."

merce by means of their great buying power, but in our case introduced no evidence in this connection.

In the present proceeding it emphasized the charge that the theatre chain of each major defendant constituted a monopoly in and of itself,* and that such monopolies, together with the power acruing from control of the large number of best-selling feature pictures produced and distributed by each major defendant, were combined through concerted action to impose the restrictions heretofore referred to.

The major form of relief which the Government demanded was that the major defendants be divested of their theatres, or in the alternative that licensing of feature pictures by a major defendant to any other major defendant be banned for 10 years. Injunctive relief against specific practices alleged to be illegal was also requested, but less insistently.

The Government's theory as to the complicity of the major defendants in a combination and conspiracy to violate the Sherman Act was along the following lines:

The distribution department of each major defendant can offer to the theatre chain of each other major defendant a large number of those quality feature pictures which promise to be the best revenue-producers. Each such theatre chain, greatly desiring such pictures, is in a position to induce its affiliated distribution department to refuse to license independent exhibitors desiring to license its pictures, and to license instead the theatre chain of a major defendant whose distribution department has quality feature pictures to offer. This because the independent exhibitor has no feature pictures to offer any distributor's affiliated theatres

*Universal, having no theatres, was, of course, not involved in this charge.

in return for the distributor's agreement to license its feature pictures to be exhibited by it.

This opportunity, involved in the possession of great buying power by the major theatre chains and in control of the disposition of such a large proportion of the best-selling feature pictures by their affiliated distribution departments, was alleged by the Government to have been taken advantage of, and to have resulted in a monopolizing of interstate commerce by the major defendants, and in unreasonable restrictions thereof. No such opportunity was open to Universal, which, possessing no theatres, needed no pictures, and had no incentive to favor an exhibitor with an affiliated distribution department over an independent exhibitor.

The Government accordingly claimed that the major defendants, through their control of first-run theatres and of such a large proportion of the best-selling feature pictures, were able, through concerted action, to control admission prices in a great majority of the thousands of motion picture theatres in the United States located in cities and towns of over 25,000 population, and in nearly all of those located in cities of over 100,000 population, to the detriment of the public, and to obtain for themselves, at the expense of independent exhibitors, prior exhibition rights,* i.e., prior runs protected by unreasonably long clearances, to the best-selling feature pictures.

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*The main bone of contention in respect of prior exhibition rights concerns clearance, i.e., the time interval which the distributor agrees with the exhibitor shall elapse between the completion of one run and the beginning of the next run, and the asserted requirement that it be "reasonable".

(b) THE CHARGE AGAINST UNIVERSAL AS DISTINGUISHED FROM THE CHARGE AGAINST THE MAJOR DEFENDANTS.

The basic charge against the Universal appellants, who possessed no theatres, on the basis of which the Government seeks to implicate them in the alleged conspiracy among the major defendants, and in like alleged conspiracies or monopolizing on the part of large independent theatre chains, is that, in licensing their feature pictures under copyright, they granted exclusive and restrictive licenses for limited times to exhibitors constituting the best, when not the only available, markets (which, by reason of the number and importance of the theatres in which the major defendants and the large independent theatre chains were interested, very frequently were chain theatres), accepted in such dealings admission price and clearance conditions which they had no power to alter, and, in so-called "franchises", committed their feature pictures, for a number of years to affiliated theatre chains by licensing contracts containing some provisions alleged to be more favorable* than those usually granted in similar contracts with the small independent exhibitor (pp. 21-22, 24-31, 94-99, *post*).

The Government also charged that in dealing with any exhibitor, however small, a distributor, whether integrated or non-integrated, and whatever its size, might not, in licensing copyrighted motion pictures upon successive runs for limited periods of time (1) require an exhibitor, on pain of losing run and clearance privileges, to maintain its current admission price, on the faith of which a film rental

*No serious attempt was made to demonstrate that such contracts over-all were not more advantageous to the distributor, *i.e.*, that the exhibitor did not pay for any advantages it obtained.

had been accepted, and by which it was frequently measured, and in accordance with which run and clearance terms had been granted, in order that it might not be free to decrease its film rental or to depreciate or destroy the valuable opportunity reserved by the distributor of obtaining further reward from the making of subsequent-run licenses, or (2) agree with a prior licensee that its license should be something less than exclusive for the duration of the copyright, in that after the lapse of a specified period of time thereafter the licensor might deliver the picture to a subsequent-run, or (3) measure royalties by a percentage of the charge made to the public to view the exhibition under copyright, or (4) offer to license its feature pictures in groups.

As against the major defendants, however, the Government claimed much more than the illegality of licenses under copyright, restrictive in respect of minimum admission price, which were exclusive for a limited time, and were protected by clearance provisions, and the measuring of royalties by a percentage of the gross receipts. Assuming the legality of all these provisions, it contended that since the major defendants had a vested interest in protecting their theatre-operating profits, they were extending their copyrights through such provisions, to protect such profits. This argument did not apply to the non-theatre-owning defendants such as Universal.

5. The defendants.

(a) PARAMOUNT

In 1944 Paramount had consolidated gross income of 150 million dollars (G. X. 405) and consolidated gross assets of 148 million dollars. (Moody's Manual of Investments, Industrials, 1946).

In 1945 Paramount and its subsidiaries had an interest in 1590 first and subsequent-run theatres (FF 117-118, R. 3683-4). It owned, operated or had an interest in first-run theatres in the following cities, among others: Atlanta, Boston, Canton (Ohio), Charlotte (N. C.), Chicago, Dallas, Detroit, Duluth, Hartford, Houston, Kansas City (Mo.), Minneapolis, New Orleans, New York, Omaha, St. Paul, Salt Lake City and Toledo. The number of such first-run theatres which it had in cities over 100,000 population in the United States was around 100. It was also interested in first-run theatres in a great number of smaller cities and towns throughout the country. In varying numbers the theatres in which it had an interest were located in nearly every State in the Union. In Chicago it was interested in 47 theatres. In New York it had theatre interests in New York City, Buffalo and Rochester, among other localities. In California it had them in San Francisco and Los Angeles. In Massachusetts it had them in Boston, Springfield, Worcester, and dozens of other places. It had an interest in 27 theatres in St. Paul and Minneapolis. In each of the States of Michigan, Pennsylvania, Florida, Texas, North Carolina and Iowa it had an interest in theatres in dozens of different localities (Ex. L 13, G. X. 64, G. X. 161).

During the 1943-44 season Paramount released 31 feature pictures (not including any Westerns) out of the 335 such features released that year by all national distributors (F.F. 99, R. 3677). 5 of these grossed over 2 million dollars, and 14 over 1 million dollars. Only 1 grossed less than one-quarter million dollars (G. X. 426).*

*In this exhibit and G. X. 427 (for the 1936-37 season) the gross receipts brackets are as follows: (1) $2,000,000 and over; (2) $1,000,000 to $2,000,000; (3) $500,000 to $1,000,000; (4) $250,000 to $500,000; (5) less than $250,000.

(b) Fox

In 1944 Fox had consolidated gross income of 172 million dollars (G. X. 404) and consolidated gross assets of 145 million dollars (Moody, op. cit.).

In 1945 Fox and its subsidiaries were interested in 642 first and subsequent-run theatres (F.F. 117-118, R. 3683-4). It owned, operated or was interested in first-run theatres in Denver, Detroit, Kansas City, Los Angeles, San Francisco, Milwaukee, Omaha, Sacramento, San Diego and Spokane, and in many smaller localities. The number of such first-run theatres in cities over 100,000 in the United States was 70 or more. It was interested in 250 theatres in California, 19 in Kansas City, 9 in Portland (Ore.), 11 in Seattle, and 30 in Milwaukee (Ex. L-13, G. X. 160, G. X. 24).

During the 1943-44 season Fox released 33 features (not including any Westerns) out of 335 such pictures released by all national distributors (F.F. 99, R. 3677). More than half of these grossed over a million dollars (G. X. 426).

(c) Loew's

In 1944 Loew's had consolidated gross income of 145 million dollars (G. X. 407) and consolidated gross assets of 190 million dollars (Moody, op. cit.).

In 1945 Loew's and its subsidiaries were interested in 157 first and subsequent-run theatres (F.F. 117-118, R. 3683-4). It owned, operated or was interested in first-run theatres in Akron, Canton, Cleveland, Dayton, Toledo and Columbus, Ohio; Baltimore, Md.; Bridgeport, Hartford and New Haven, Conn.; Boston, Mass.; Denver, Colo.;

Indianapolis, Ind.; Pittsburgh, Harrisburg and Reading, Pa.; Houston, Texas; Jersey City and Newark, N. J.; Louisville, Ky.; Kansas City and St. Louis, Mo.; Memphis and Nashville, Tenn.; New Orleans, La.; Providence, R. I.; Richmond, Va.; Washington, D. C.; Wilmington, Del.; and Atlanta, Georgia. It was interested in over 70 such theatres in New York City, including many first-runs. The number of its such first-run theatres in cities over 100,000 populations in the United States was about 50 (Ex. L-13, G. X. 163).

During the 1943-44 season Loew's released 33 features (not including any Westerns) out of the 335 such pictures released by all national distributors (F.F. 99, R. 3677). 23 of these grossed over a million dollars (G. X. 426).

(d) Warner

In 1944 Warner had consolidated gross income of 141 million dollars (G. X. 403) and consolidated gross assets of 183 million dollars (Moody, op. cit.).

In 1945 Warner and its subsidiaries were interested in 541 first and subsequent-run theatres (F.F. 117-118, R. 3683-4). It owned, operated or had an interest in first-run theatres in Akron, Albany, Baltimore, Bridgeport, Camden, Cleveland, Hartford, Jersey City, Los Angeles, Memphis, Milwaukee, Newark, N. J., New Haven, New York City, Philadelphia, Pittsburgh, Washington, D. C., Wilmington, Worcester and Youngstown, Ohio. Its such first-run theatres in cities with over 100,000 population in the United States numbered over 50. It was interested in 78 theatres in Philadelphia, 24 in Pittsburgh and 19 in Washington, D. C. (Ex. L-13, G. X. 156).

During the 1943-44 season Warner released 19 feature pictures (not including any Westerns) out of the 335 such

pictures released by all national distributors (F.F. 99, R. 3677). 9 of these grossed over 2 million dollars, and 13 grossed over a million dollars (G. X. 426).

(e) RKO

In 1944 RKO had a consolidated gross income of 84 million dollars (G. X. 406) and consolidated gross assets of 80 million dollars (Moody, op. cit.).

In 1945, RKO and its subsidiaries were interested in 273 first and subsequent-run motion picture theatres (F.F. 117-118, R. 3683-4). They were interested in first-run motion picture theatres in Boston, Chicago, Cincinnati, Cleveland, Columbus, Dayton, Kansas City (Mo.), Los Angeles, Indianapolis, Newark, Omaha, Providence, San Francisco, Rochester (N. Y.), and Washington, D. C. They were interested in over 40 first-run theatres in cities over 100,000 population in the United States (Ex. L-13).

During the 1943-44 season RKO released 38 feature pictures (not including any Westerns) out of the 335 such pictures released by all national distributors (F.F. 99, R. 3677). 13 of these grossed over a million dollars (G. X. 426).

(f) United Artists

United Artists' consolidated gross income for 1944 does not appear in the record. It apparently does not make public its consolidated gross assets.

It had no theatres and produced no motion pictures, being exclusively a distributor for feature pictures produced by independent distributors (F.F. 58, 53, R. 3670, 3669).

During the 1943-44 season United Artists released 16 feature pictures, not including any Westerns, out of the 335

such pictures released by all national distributors (F.F. 99, R. 3677). 4 of these grossed over a million dollars and 10 grossed over one-half million dollars (G. X. 426).

(g) Columbia

In 1944 Columbia had consolidated gross income of 37 million dollars (G. X. 413) and consolidated gross assets of 25 million dollars (Moody's, op. cit.).

It had no theatres, confining its operations to the production and distribution of motion pictures (F.F. 58, 44, R. 3670, 3667).

During the 1943-44 season Columbia released 41 feature pictures, exclusive of Westerns, out of the 335 such pictures released by all national distributors (FF 99, R. 3677). 6 of these grossed over a million dollars, but 30 grossed under half a million dollars (G. X. 426).

(h) Universal

In 1944 Universal had consolidated gross income of 51 million dollars (G. X. 408) and consolidated gross assets of 33 million dollars (Moody's, op. cit.).

It had no theatres, confining its operations to the production and distribution of motion pictures (G. X. 146, F.F. 58, 47-52, R. 3670, 3668-9).

During the 1943-44 season it released 49 feature pictures (exclusive of Westerns) out of the 335 such pictures released by all national distributors (F.F. 99, R. 3677). Half of these grossed under one-quarter million dollars, and none as much as 2 million dollars. In the 1936-37 season its gross consolidated income was only 14 million dollars (G. X. 408), and 32 out of the 40 features it released grossed less than $250,000 (G. X. 427).

6. The nature and character of the Government's evidence.

The Government called no witnesses, except two in rebuttal to collate statistical evidence. Its evidence consisted exclusively of documents and data obtained from the defendants through interrogatories and demands for admissions (Gov. Opening Statement, R. 6-7).

As recited in its Jurisdictional Statement, the plaintiff considers its case to rest mainly upon the following categories of evidence allegedly contained in the record (1) an exposition of the corporate structure of each defendant; (2) the general manner in which the major defendants' theatre holdings had been acquired, with an accurate description of their individual theatre holdings by name, location, and size; (3) the precise manner in which the major defendants jointly controlled, with each other and with other exhibitors, specific theatre operations; (4) the general forms of agreement used by all the defendants in licensing films and representative executed agreements by which they had licensed each other and their affiliated theatres; (5) tabulations of film rentals paid by their theatres to all distributors and received by the defendants as distributors from all theatres; (6) tabulations showing the pattern of distribution of feature films of all eight defendants among the principal theatres in the principal cities of the United States, and the restrictive provisions therein; and (7) arbitration and appeal board decisions (G. J. S., pp. 7-8).

The conclusions drawn in the Government's Jurisdictional Statement from the foregoing, upon which it founds its case against the non-theatre-owning defendants, were (1) that such defendants had "discriminated" in their licensing against small independent exhibitors, through do-

ing the greater proportion of their business with affiliated exhibitors, by means of contracts allegedly containing certain more favorable provisions and (2) that the effect of the employment of "restrictive provisions" in licenses under copyright by such defendants was to maintain a uniform system of runs, clearances and admission prices in all areas, as had been fixed by the theatre-owning defendants acting in concert (G. J. S., pp. 7-8).

No exhibitor testified that he had been in any way injured by any of the activities of any of the defendants, much less by those of any of the three minor defendants.

The various defendants called as witnesses certain of their officers, agents and directors, together with officers and representatives of some of their subsidiaries. The only witness called by Universal was Scully, its Sales Manager. We believe that it can be fairly said that no evidence of any real consequence in support of the Government's case came in upon the defendants' cases.

The presiding judge at the trial, Circuit Judge Augustus N. Hand, remarking upon what the Government had said in its opening about the three minor defendants, said: "It seems to me it is pretty slim" (R. 154). When the case was being summed up, he was still of this opinion, saying to Columbia counsel (R. 2725): "I never could see much of a case against you. I said so in the beginning, but in considering it further, I may yet be convinced that you are in it". In its opinion (R. 3517), after remarking that the control of distribution it had found closely resembled that appearing in *Goldman Theatres v. Loew's*, 150 Fed. 2nd 738 (C. C. A. 3rd, 1945), it said: "The defendants in the *Goldman* case were substantially the same as those here, except that Universal Corporation was there eliminated by agreement".

In *U. S.* v. *Crescent Amusement Co.*, in this Court, 323 U. S. 173, in which the plaintiff proceeded against all eight distributors who are here, the lower court dismissed as against the major distributors because of the Government's undertakings in the Consent Decree, and as Mr. Justice Douglas in his opinion, at p. 176, said of the remaining three defendants: "The lower court found that only one had violated the Sherman Act", and that one was not Universal.* Nor was Universal involved in *Bigelow, et al.* v. *R. K. O.*, 327 U. S. 251. In *U. S.* v. *Schine Chain Theatres Inc., et al.*, 63 Fed. Supp. 229, now here on appeal, all of the distributors were dropped as defendants, and the Court said at p. 240: "We are not called upon in this suit to decide whether there were any violations by these defendants of the law as laid in the complaint. Paramount et al. are not parties here." Likewise in *U. S.* v. *Griffith Amusement Company, et al.*, 68 Fed. Supp. 180, now here on appeal, all of the distributor defendants were dismissed prior to trial.**

Finally it is important to note that reversal of the judgment as against Universal does not require a weighing of conflicting evidence bearing upon any of what we consider to be the evidentiary findings of fact, but only the determination of the proper ultimate legal conclusions to be drawn from such evidentiary facts. Thus the basic facts with respect to minimum admission price-fixing are undisputed.

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*F.F. 148-163, which appear at pp. 1462-4 of the record in that case in this Court, discuss Universal's activities in detail, and find that they were either non-discriminatory against small independent exhibitors or favorable to them.

**The five major defendants were dropped by reason of the Consent Decree. The three minor defendants, who did not consent, were presumably dropped in both these cases by reason of the fact that it was believed by the Government that the evidence was insufficient to justify asking a decree against them.

(F.F. 61, 62, 63, R. 3670). Only the ultimate legal conclusions drawn therefrom are contested (F.F. 64, 65, 66, 69, 70, 71, 72, R. 3670-3). So also as to clearances and runs the basic facts are undisputed, or there is no conflicting evidence with respect thereto. (F.F. 73, 74, 75, 76, 78, R. 3673-4). The ultimate legal conclusions properly to be arrived at therefrom are, however, in dispute (F.F. 81, 82, R. 3674). What are labelled findings with respect to franchises and master agreements (F.F. 88, 89, R. 3675) are clearly conclusions of law, the facts in this connection being uncontested (F.F. 92, R. 3676). The "block-booking" findings F.F. 93, 94, R. 3676), insofar as Universal is concerned, are supported by no evidence at all, as respects the critical element of conditioning. The "discrimination" findings (F.F. 110, 111, R. 3681-2) which resulted in no decretal provision, merely recite contractual provisions, and conclude as a matter of law that they unreasonably restrain trade. Lastly, there is an observation or argumentative conclusion, which is not a true finding of fact at all,* that the evils in the industry are attributable to non-competitive distribution practices and not to the ownership of theatres (F.F. 154, R. 3690). The findings contain many other such argumentative statements.

7. The salient facts relied upon as against Universal.

(a) Admission Prices.

In licensing feature motion pictures to an exhibitor the distributor makes a temporary bailment, for the period of the exhibition, of a positive print of the feature, to enable

*Obviously the government agrees with us here, because it states (br., p. 11) that it does not challenge "any of what we believe to be evidentiary findings," and thereafter strongly challenges this finding.

the exhibitor to exercise the intangible exhibition rights under copyright which are licensed to him (F.F. 61, R. 1460, G. X. 289-90).

The better quality features are generally licensed for a royalty measured by a certain percentage of the exhibitor's gross receipts. This percentage may increase as the gross receipts go up, and there is frequently a guaranteed minimum to be paid. The poorer quality pictures are licensed for a flat rental. In fixing this flat rental, however, the distributor is generally, if not always, aware, through past experience, of what gross receipts have accrued to the particular theatre-owner in exhibitions of others of his pictures, and the flat rental, therefore, is necessarily based to a considerable extent upon what gross receipts are expected from the picture (R. 430-1, 570-2, 694-9, 1495, 1722-3, 1982-3, 725-7).

Exhibitors have found that it is impractical to vary their admission prices from day to day in accordance with their estimates of the comparative quality* of the pictures being shown. The public expects a consistent admission price, and would resent being asked on Wednesday to pay a higher price than on Monday, merely because the exhibitor believed that a better picture was being shown.** Indeed,

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*A few exceptional features which have cost exceptionally large amounts to produce, such as 'Gone With the Wind", "For Whom the Bell Tolls", "Song of Bernadette" and "Wilson", have been exhibited in recent years, prior to general release, at advanced prices, under what are known as "road-show" arrangements (R. 720-2). *None of these pictures were distributed by Universal.*

**Admission prices in the evenings may differ from the daytime prices, or those on Saturdays, Sundays or holidays may differ from week-day prices, but the point is that prices for comparable playing time cannot, as a practical matter, be changed, depending upon what the exhibitor believes is the quality of the picture, or what distributor released it.

it is clear that the public might emphatically disagree with the exhibitor's judgments as to comparative quality (R. 722-3, 969, 1382-3).

From an exploitation standpoint, the conditions under which the first-run showing of any feature picture takes place are of great importance to its success in the first-runs and its future career in the subsequent-runs. In order to have the best conditions and to properly advertise the picture, the best theatres must be selected for the first-run showing, which theatres naturally charge the highest prices (pp. 5-7, *ante*).

Since the distributor, by reason of a continuing interest in the proper exploitation of his picture, upon which depends what film rental he gets in the aggregate for his picture, including subsequent-run licenses, is vitally interested in the maintenance of the exhibition conditions, and in the price differentials between runs, upon which he relies in the licensing of his pictures and in the granting of clearances, he generally requires a covenant from the exhibitor that the admission price shall not be reduced during the run of the particular picture licensed, so as to draw upon subsequent-run patronage, thereby depreciating, or perhaps destroying, the valuable opportunity reserved by the distributor of obtaining further reward from the making of subsequent-run licenses. In other words, a breach of such covenant results in the licensee's engaging in competition with the licensor, which the latter under its statutory monopoly has the right to prohibit (pp. 64-83, *post*).

The result of the foregoing practice, which is general among distributors, including all independent distributors (R. 544-5, 918), is that the minimum admission price specified is generally the same in the contracts of all distributors,

it being the usual admission price currently charged by the exhibitor (F.F. 63, R. 433-4, 718, 968, 999, 1083-4).

(b) Clearance.

It is not customary in the motion picture business for distributors to exercise their full legal rights under their statutory copyright monopolies in order to give exhibitors exclusive licenses. Instead they license their feature pictures in a series of runs, with time intervals between the runs (R. 705-7, 418-23, 1895, 1908). Generally speaking, and up to a certain point at least, the longer the time interval between a prior and subsequent run, the more valuable the prior run is, and the more the prior licensee will have to pay for it in the way of film rental. Therefore, the prior licensee, who is interested only in his own run, wants the largest clearance he can obtain over subsequent runs, without paying too much for it. The licensor, however, is interested in the total aggregate revenue he can obtain from all runs. Under such circumstances it is obvious that a licensee must have an agreement from a licensor for clearance, since the film rental he pays is to a very considerable extent based on the amount of the clearance he gets (R. 422-3, 707-9, 712-13, 948, 150-2, 1376, 1707-9, 1895-1923).

Clearances given by the various distributors, including the so-called independent national distributors (R. 997, 1003, 1376), tend to be more or less uniform. The tendency toward uniformity is readily explicable without having to assume any illegal action among the major defendants, or on the part of large independent circuits, to employ their alleged monopolistic power in order to fix clearances which

Universal would have no alternative but to adhere to. As has been heretofore pointed out, the amount of film rental paid by a prior-run exhibitor is a function of clearance, i.e., the longer and broader the clearance, the higher the film rental. The reward accruing to the prior-run exhibitor is correspondingly a function of clearance, because the longer and broader the clearance the more complete is his opportunity to induce all of the potential patronage, which is ready, willing and able to pay his admission price, to view the exhibition in his theatre. A clearance of definite length and breadth is therefore something of very concrete advantage to an exhibitor, which advantage is necessarily the same whatever distributor supplies the feature picture. On the other hand it is impossible for an exhibitor to buy feature pictures, from the various distributors, on a comparable price basis. Each feature picture is different from every other. Thus whereas standardized articles, for competitive reasons, tend to be sold at the same price, feature motion pictures, for the same reasons, tend to be sold on the same clearance, since one distributor, particularly a medium-sized one, anxious* to license a particular theatre cannot afford to offer less clearance than another thinks it fair to give.

It is also obvious that if a particular distributor gives a clearance longer than those of its competitors, it will be handicapped in licensing subsequent-runs in competition with such competitors, particularly as a difference in clear-

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*As hereinafter pointed out (p. 102, *post*) theatres without competition, or having ineffective competition, which the Government claims is a very common situation (Gov. br., pp. 15-19), can virtually dictate their own terms to a distributor anxious to deal with the best outlet.

ances may interfere with an even flow of pictures to subsequent-runs* (R. 713-17, 948, 950-2, 1715, 1895-1908).

Likewise, each distributor is confronted with the same business factors and conditions in determining the clearance he desires to give (R. 423-4). With relatively few exceptions, therefore, the clearances granted by the different distributors to a particular theatre are uniform (R. 707-11, 977, 1003, 714-17, 1376, 1707-9, 1715).

That clearances ought to be uniform is an inarticulate major premise of the arbitration system set up by the District Court under the Consent Decree, and neither the arbitrators nor the Appeal Board ever prescribed different clearances for different distributors or for different pictures of one distributor (G. X. 1-5). They always prescribed one reasonable clearance, which thereupon appertained to the particular *theatres involved*. True, they prescribed it as the maximum allowable clearance, but they necessarily knew that it was inevitable that, as a practical matter, it be taken as *the* reasonable clearance, not only by the parties to the arbitration but by all other distributors (R. 712, 1447-9).

(c) Other Trade Practices.

Since Universal customarily produced from 45 to 50 feature pictures a year (R. 1456-7), and since there are 18,000 motion picture theatres in the United States, with

*This is particularly plain when a subsequent-run theatre, which must, of course, plan its programs in advance, double-features, showing, as is customary, a feature picture of two different distributors, such as Loew's and Universal. If the clearances were different, the pictures would not be available at the same time for complementary showing.

a large percentage of which on the average Universal had dealings (R. 1468, 1457-8), many hundreds of thousands of transactions would have been involved had it licensed its feature pictures theatre by theatre and picture by picture. Instead of doing this, it offered its entire season's product at one time by title and description, prior to production, and, if unable to license its entire line of motion pictures to an exhibitor, obtained a commitment for as many thereof as possible from such exhibitor or some other exhibitor (R. 1468-73). It frequently contracted to license the same to exhibitors operating chains of theatres, and it is claimed that these wholesale buyers got better terms in some respects than small buyers. The arrangement under which a distributor commits its pictures to an exhibitor operating such a theatre chain is known as a "master agreement".* Prior to the Consent Decree the major defendants "block-booked" (R. 547-9). Columbia also "blocked-booked" (R. 1272), but United Artists did not, because its deals with independent producers required each producer's pictures to be sold separately. Independent exhibitors desire to purchase their pictures in large groups, as it gives them assurance of product (R. 427-8, 1257-9, 1272, 1275-7).

Many theatres and chains of theatres, particularly independents, wanted to be assured of Universal product over a period of years (R. 1469, 427-8). Universal, therefore, entered into franchise arrangements, and at the time of the trial had 727 of these with independent exhibitors, 43 with affiliated exhibitors (R. 1472-84). Very few of these franchises were over two or three years in length (Ex. U-2).

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*This has to be supplemented by "deal sheets" containing the provisions governing the exhibition of particular feature pictures in each particular theatre.

(d) First-run Licensing

The Government directed much of its evidence to the licensing of first-run theatres in 92 cities in the United States having a population of 100,000 or over. In 38 of these cities there were no independent first-run theatres. In 4 there were no affiliated first-run theatres. In the remaining 50 cities Universal licensed nearly as many independent theatres as it did affiliated theatres (Ex. U-1).

8. The decree.

Sec. II of the Decree (R. 3695-8) deals with the sanctions imposed upon distributors. They are forbidden to require exhibitors to maintain current admission prices (sub-div. 1). They are forbidden to agree among themselves to maintain a "system of clearances". They are restrained from agreeing with exhibitors to maintain a "system of clearances", but it is not made clear what "system of clearances" means (sub-div. 2). Clearances between theatres not in substantial competition are banned (sub-div. 3). The test of the validity of a clearance granted to a theatre in substantial competition with another is stated to be whether it is "in excess of what is reasonably necessary to protect the licensee in the run granted" (sub-div. 4). The burden of proof of sustaining the legality of any clearance is placed upon the distributor (sub-div. 4).

Distributors are restrained from making or further performing franchises, formula deals and master agreements (sub-divs. 5 & 6). They are further restrained from making or further performing any license in which the

right to exhibit one feature is conditioned upon the licensee taking one or more other features (sub-div. 7). In the event that any features have not been trade-shown prior to the granting of a license for more than one feature, the licensor is required to permit the licensee to reject 20% of such features (sub-div. 7).

The sole and exclusive method to be followed by all defendant distributors in licensing their features in the future is laid down in substance as follows (sub-div. 8):

(a) Every exhibitor is to have an opportunity to exhibit a feature picture upon some run, and the picture must be offered upon uniform terms to all who would exhibit it upon such run;

(b) Licenses shall be granted without discrimination in favor of old customers, affiliated theatres or others, and shall be granted solely "upon the merits". What "the merits" means is not defined, except as forth in the next sub-division;

(c) Where a distributor desires to offer his feature picture in accordance with the usual run system, he must ask for bids from all exhibitors in the competitive area. In asking for such bids, a distributor must state the flat rental acceptable to it for a specified playing time, the time when the exhibition is to commence, the availability, and clearance, if any, which will be granted for each such run. Exhibitors may bid in terms of flat rentals, percentage of gross receipts, or other form of rental, and shall specify the clearance and playing time desired. The distributor may reject all offers, but if he accepts any, must grant the

license "to the highest responsible bidder,* having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor".

(d) Each license shall be taken theatre by theatre and picture by picture.

A distributor may not arbitrarily refuse to license a feature on a particular run to a particular exhibitor (subdiv. 9).

Questions Presented

1. Whether a medium-sized non-theatre-owning distributor of copyrighted feature motion pictures violates the Sherman Act by granting restrictive licenses to small exhibitors, which are exclusive for limited periods of time, and the exclusivity of which is protected by agreement not to license others during further limited periods of time, when the restriction is against a reduction in the current admission price of the exhibitor, upon the basis of which the license fee is negotiated, and is frequently measured, and reduction in which would depreciate or destroy the value of the unlicensed subsequent runs remaining in the hands of the licensor.

2. Whether such a licensor may, instead of exercising its full legal right to agree with licensees to grant them exclusive licenses limited only by the duration of the copy-

*In fact the identity of the "highest responsible bidder" cannot be determined until after the run-off of the picture, when any bid is in percentage terms. Thus a bid of $1,000 cannot be compared with a bid of 40% of the gross receipts. Nor is a bid of 50% of the gross receipts by theatre A necessarily higher than 40% by theatre B. The latter may have more seats, a better location, physical appointments and management. Moreover, through experience, the distributor may know that B is responsible and have no adequate knowledge as to A.

rights, agree with them for exclusive licenses for shorter terms, and, in the aid of the exclusivity of such licenses, further agree that it will not license others for given lengths of time thereafter.

3. Whether such a licensor may properly provide for royalties measured by a percentage of what the licensee charges the public to view the exhibition of the pictures under copyright.

4. Whether such a licensor, requiring well-established show-windows for its pictures, may commit itself to an exhibitor operating a number of theatres, and requiring a well-established source of supply for feature pictures, to grant such exclusive licenses for limited periods of time, protected by clearance periods, upon all its copyrighted pictures released during a given period of years, i.e., grant what are known as "franchises".

5. Whether the legality of a specific clearance depends upon its "reasonableness", and if so, whether the licensor ought to determine the "reasonableness" of a clearance in the light of the need of the licensee for protection against subsequent-runs, or in the light of the economic desires of the subsequent runs, and not in the light of the normal and reasonable relationship thereof to the right of the licensor to obtain pecuniary reward in exploiting his copyright monopoly.

6. Whether or not a medium-sized non-theatre-owning distributor of copyrighted feature motion pictures may legally offer the same in a group and license such pictures to the exhibitor among competing exhibitors who is willing to take the greatest number thereof.

7. Assuming that the major defendants, each of whom is interested in a large number of motion picture theatres, first-run and subsequent-run, located in various parts of the United States, and who in the aggregate distribute most of the best revenue-producing feature pictures, or large independent circuits, were engaged in combinations and conspiracies to monopolize and restrain interstate commerce, pursuant to which they were able to fix and determine priorities in run, and to fix and determine clearances and admission prices, not only for their own theatres but for substantially all the important motion picture theatres in the United States, did this compel a medium-sized non-theatre-owning distributor to choose between (1) refraining from licensing its feature pictures to such theatres in the manner heretofore described, or (2) becoming implicated in such alleged combinations and conspiracies.

8. Under the conditions assumed in the last preceding question, was a medium-sized non-theatre-owning distributor legally entitled to negotiate film rentals with chain theatres, on the basis of runs, clearances and admission prices fixed by them, and which it had no power to alter.

9. Under the conditions assumed in question No. 7, does the fact that the major defendants have obtained franchises from a medium-sized non-theatre-owning distributor, which franchises it is assumed were legally granted to secure firm outlets for the product of such distributor, but, it is further assumed, were made use of by the major defendants in the effectuation of a combination and conspiracy, mean that the injunction against enforcing such franchises must run against the licensor as well as against the licensee.

10. Is it proper to draw an inference of participation in such a combination and conspiracy against such a distributor, from the fact that the admission prices and clearances which it specifies in dealing with particular licensees are, by and large, similar to those specified by other distributors, when such similarity can be reasonably accounted for (1) by the business necessity which requires the licensee exhibitors to charge a consistent admission price from day to day, irrespective of what distributor's pictures are being shown, which admission price all the distributors require, in the exercise of their rights under copyright, shall not be reduced, and (2) by the business convenience or necessity which suggests or dictates to an exhibitor that he operate on the same clearance from all distributors, and the inability of such a distributor, desiring to license its feature pictures to a particular exhibitor, to refuse to grant as great a clearance as has proved acceptable to the other distributors.

11. Is a licensor of feature motion pictures, which has no theatres, and which distributes a very small proportion of the best-drawing pictures, employing legal licensing methods, properly to be implicated in an alleged conspiracy among the five largest companies in the industry, who collectively are interested in most of the best theatres and control most of the best-drawing pictures, by reason of the fact that such licensor does a high proportion of its business with such companies.

12. Does the Sherman Act and the Constitution authorize a court of equity, instead of confining itself to injunctive relief and/or ordering the dissolution of any existing monopolies, to impose a mandatory system of competitive bidding, regulating in detail the operations of non-theatre-owning distributors, who are not public utilities.

13. Assuming that some sort of decree should be made against the appellants, are the provisions of the decree entered by the Court below with respect to trade practices legally authorized.

Specification of Assigned Errors to be Urged

In their Assignments of Error the Universal appellants have specified in detail the respects in which they contend that the Court below erred in making its findings of fact (Assignments of Error, 1-28, R. 3789-93); in making its conclusions of law (Assignments of Error, 29-33, 92, 103, R. 3793-4, 3802-3); in framing its decree (Assignments of Error, 34-61, 93-99, 102, R. 3794-3797, 3802-3); in failing to make findings proposed by Universal which ought to have been made in order to arrive at proper conclusions of law (Assignments of Error, 62-91, R. 3797-3802); in failing to conclude that the Universal appellants did not participate in any combination and conspiracy, and that a decree of dismissal should be entered as to each of them (Assignments of Error, 104-105, R. 3804); and in failing to grant motions to dismiss the Petition and Amended and Supplemental Complaint made by the Universal appellants (Assignment of Error, 101, R. 3803).

Such assignments of error, all of which the Universal appellants regard as material to the issues presented in this brief, are discussed under appropriate headings herein.

Summary of Argument

A non-theatre-owning licensor of copyrighted feature motion pictures is entitled, by virtue of its statutory monopoly, to grant restrictive and/or exclusive licenses, in which the royalties payable are measured by a percentage of what the licensee charges the public to view the exhibiton under

copyright. Such licenses, when granted to small independent exhibitors, admittedly not engaged in any combination or conspiracy to restrain or monopolize interstate commerce, certainly do not involve the licensor in any violation of the Sherman Act.

In such licenses, the licensor may forbid the licensee to compete with it except to a limited extent, and is not required to permit the licensee to compete with it to the fullest extent or not at all. Thus when a licensor exploits his statutory monopoly by a series of exclusive licenses which are limited in time, and which are protected in their exclusivity by agreements not to license others during further periods of time, and the value of the subsequent-run licenses remaining in the hands of the licensor, after the granting of a prior-run license, depends to a large extent on the differential between the admission price charged on the prior run and the admission prices charged by the subsequent-runs, the licensor may properly provide in the prior-run licenses against a reduction in the current admission price of the licensee, which reduction would depreciate or destroy the value of the unlicensed residue remaining in the hands of the licensor. The fact that film rental is to a large extent based on the admission price charged also justifies the restriction.

Such a licensor, in exploiting his statutory monopoly under copyright, is not limited to granting an exclusive license for the duration of the copyright. It may grant a series of exclusive licenses for limited times, and, in aid of the exclusivity of such licenses, further agree that it will not license others for given lengths of time thereafter. In so doing it is not exceeding its legal rights but is, on the contrary, refraining from fully exerting the right to exclude which belongs to it by virtue of its statutory monopoly.

Such a licensor, granting restrictive and exclusive licenses, may properly provide for royalties measured by a percentage of what the licensee charges the public to view the exhibition under copyright, this being a fair and customary method of measuring royalties.

Such a licensor may properly commit itself to an exhibitor, operating a number of theatres, to grant it restrictive and exclusive licenses under its copyrights, for limited times, protected by clearance periods, for all copyrighted pictures released during a given period of years, this amounting to no more than dealing on a wholesale basis with a customer as one finds him, and the obtaining of firm outlets for the distributor's pictures. If the licensee, by reason of the fact that it is involved in a combination and conspiracy to monopolize, is able to employ, and does employ, such franchises in effectuating its illegal aims, the franchises it has been granted should certainly be cancelled, but no injunction should issue against the licensor unless it has actually joined mind and hand with the licensee in its illegal activities.

Clearance is not a restriction upon the licensee, and hence its legality does not depend upon whether it is normally and reasonably adapted to secure pecuniary reward for the licensor. In agreeing to grant exclusive licenses for limited periods separated by agreed-upon clearance periods, the licensor is refraining from exercising to the fullest extent the rights granted to him to exclude all others for the duration of his copyright, and he is not required to limit himself to what may be considered to be "reasonable" clearances in the light of the necessities of the licensee for protection against subsequent-runs, or in the light of the economic desires of the subsequent runs. Were it other-

wise, there is nothing to show that Universal granted any "unreasonable" clearances.

The right of a medium-sized non-theatre-owning distributor of copyrighted feature motion pictures to grant restrictive and exclusive licenses on percentage terms is not diminished by the fact that theatre chains who are its licensees may be engaged in combination and conspiracies to monopolize and restrain interstate commerce, pursuant to which runs, clearances and admission prices, not only for their own theatres, but for substantially all the important motion picture theatres in the United States, have been fixed. To hold otherwise would mean that such a medium-sized non-theatre-owning distributor would be deprived of its best, if not its only available, markets, or at the least of the right to license its copyrighted feature motion pictures in such markets in accordance with its legal rights.

In thus licensing its pictures, the obvious fact that such a medium-sized non-theatre-owning distributor may have to negotiate film rentals on the basis of runs, clearances and admission prices it is unable to alter, does not change the situation. Nor is it any evidence of participation in any such assumed combination and conspiracy that such medium-sized non-theatre-owning distributor receives a large proportion of its film rentals from theatres which are affiliated with the members of such an assumed combination and conspiracy. Obviously those who are assumed *arguendo* to dominate the exhibition business in particular localities will control the theatres which will afford the best, and sometimes the only, available markets, for the feature pictures of such a distributor.

If it be assumed that there were no such combinations and conspiracies, then it is obvious that the Universal

appellants were not guilty of participation in any combination or conspiracy.

If such a distributor has the right, as we think it clear that it has, to require its licensees under copyright to maintain their admission prices, to protect its own interests, then the business necessity which requires an exhibitor to charge a consistent admission price from day to day, irrespective of what distributor's pictures are being shown, makes it inevitable that there be uniformity in the admission prices specified in the licenses of all distributors embodying such a legally permissible clause in their contracts.

Likewise the similarity of the clearances specified by Universal to those specified by other distributors, in licensing particular theatres, to the extent that it exists, is readily explained. Exhibitors, for reasons of business convenience and necessity in arranging their programs, do not want different clearances from the various distributors. Universal, if it desires to license its feature pictures at all to a particular exhibitor, cannot refuse to grant a clearance thus required by the exhibitor for practical operating reasons, and which has proved acceptable to the other distributors. As a matter of sheer competitive necessity it can do no less, the exhibitor being in a position to enforce its demands.

Such a medium-sized non-theatre-owning distributor of copyrighted feature motion pictures is not restricted to offering such pictures one at a time, but may legally offer all of the same in a group and license that exhibitor, among competing exhibitors, who is willing to take the greatest number thereof. Even if such a distributor did condition the licensing of one feature motion picture upon the licensee's willingness to accept others, of which there is no proof

as against the Universal appellants, this would not be contrary to the Sherman Act, in view of the non-monopolistic situation of the licensor and the lack of any showing of unreasonably restrictive effects upon competition.

Assuming that a decree of some sort should issue against the Universal appellants, the imposition of a mandatory system of competitive bidding, regulating in detail the operations of a non-theatre-owning distributor which is not a public utility, is unauthorized by statute or the Constitution. The Court should confine itself to injunctive relief and/or ordering the dissolution of any existing monopolies, and not usurp legislative power by prescribing administrative regulations.

The various provisions of the decree with respect to minimum admission prices, clearances, franchises, master agreements and block-booking require revision in any event.

ARGUMENT

Part One

UNIVERSAL, IN LICENSING ITS FEATURE MOTION PICTURES UNDER COPYRIGHT TO INDEPENDENT EXHIBITORS, NOT CLAIMED BY THE GOVERNMENT TO HAVE BEEN ENGAGED IN A COMBINATION AND CONSPIRACY TO VIOLATE THE SHERMAN ACT, WAS ENTITLED TO GRANT RESTRICTIVE AND EXCLUSIVE LICENSES OF THE CHARACTER HERETOFORE DISCUSSED, WHICH PROHIBIT THE REDUCTION OF CURRENT ADMISSION PRICES, SPECIFY CLEARANCES, AND PROVIDE FOR ROYALTIES MEASURED BY A PERCENTAGE OF THE ADMISSION PRICE.

1. In General.

All of the feature motion pictures licensed by Universal are copyrighted (R. 658-9, 1460, 1723). When they are licensed for exhibition, no title passes to any physical thing, since the positive print which is furnished to the licensee to run through his projector, is temporarily bailed, and remains at all times the property of the licensor, who thereafter will furnish it successively to numerous subsequent-run licensees (G. X. 289-90, R. 1460). Such cases as *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 337 and *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, condemning as illegal attempts by copyright-owners and patentees to fix the resale prices of articles to which title had passed are therefore entirely inapplicable.

Article I, Section 8, paragraph 8 of the United States Constitution reads as follows: "To promote the progress of science and useful arts by securing for limited times to

authors and inventors the exclusive right to their respective writings and discoveries". Patents and copyrights are thus dealt with *pari passu*.

Under the Copyright Act of March 4, 1909, 35 Stat. Part 1, pp. 1075-88, as amended August 24, 1912, 37 Stat. Part 1, pp. 488-90, the owner of a copyright of a motion picture is given the exclusive right, *inter alia*, to "*publish*" it, and "to *exhibit, perform,* represent, produce or *reproduce,* it in any manner or by any method whatsoever". (Emphasis ours.) In exhibiting the copyrighted feature picture the exhibitor also "*performs*" a drama and "*reproduces*" the original performance. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55; *Patterson* v. *Century Productions*, 93 F. (2d) 489; *M. G. M.* v. *Bijou Theatre Co.*, 3 Fed. Supp. 66.

The nature of the copyright monopoly is discussed by Chief Justice Holmes, speaking for an unanimous court, in *Fox Film Corporation* v. *Doyal*, 286 U. S. 123, at p. 127, where he says:

> "A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects' ". *Kendall* v. *Winsor*, 21 Howe, 327, p. 328; *Grant* v. *Raymond*, 6 Pet. 218, 241.

He further says at page 130:

> "Copyright is a right exercised by the owner during the term, *at his pleasure*, and *exclusively for his own profit*, and forms the basis for extensive and profitable business enterprises". (Emphasis ours.)

And at page 131:

> "Royalties from copyrights stand in the same position as royalties from the use of patent rights,

> and what we have said as to the purposes of the Government in relation to copyrights applies as well *mutatis mutandis* to patents which are granted under the same constitutional authority to promote progress of science and useful arts".

In *Interstate Circuit Inc.* v. *U. S.*, 306 U. S. 208, pp. 227-8, this Court pointed out that *"the owners of the copyright of a motion picture film acquire the right to exhibit the picture and to grant an exclusive or restrictive license to others to exhibit it."* (Emphasis ours.)

Speaking, in a recent case, of the right of a patentee to grant limited or restrictive licenses, this Court said in *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436, p. 456:

> *"He (the patentee) may grant licenses to make,* use or vend, *restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege,* save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give." (Emphasis ours).

2. The minimum admission price restriction.

The only restriction contained in Universal's licenses under copyright with respect to which the Government makes any serious contention is that relating to the minimum admission price to be charged by the exhibitor for viewing an exhibition of the copyrighted picture under the license.* The minimum admission price thus specified is invariably the current admission price usually

*Clearance, as hereinafter explained, is not a restriction upon the licensee or upon anyone else who is entitled to complain about it. If it were, its legality would not be affected, since it is normally and reasonably related to the licensor's pecuniary reward.

charged by the exhibitor (F. F. 63, R. 433-4, 718, 968, 999, 1083-4). This admission price is the same, irrespective of what distributor's pictures are being shown, and must necessarily be, since public acceptance for varying admission prices cannot be obtained (pp. 25-26, *ante*). Universal, a medium-sized distributor, does not and cannot possibly set its own price, even in the case of a small independent exhibitor—much less in the case of a large theatre chain, and is therefore content to protect itself against change in an existing price on the faith of which it has accepted a film rental, frequently measures its film rental, and has granted clearance and run. No limitation is placed upon the exhibitor's right to charge more than this price, and thus to fix his own terms for any additional entertainment provided or other motion pictures shown (G. X. 289-290). *There is thus no attempt whatsoever to extend the scope of the statutory monopoly.*

If the exhibitor does reduce his admission price below the minimum, the distributor is given the right (a) to terminate the license; or (b) to reduce the amount of clearance; and (c) if no clearance has been granted, he may delay notice of availability for not more than a specified time, and any run which has been granted is deemed revoked. All that these provisions enable the licensor to do is to compensate for the changed situation, by withdrawing wholly or partially privileges granted on the faith of the admission price being charged.* If the distributor does not terminate the license, the exhibitor is required to account for all admis-

*A change in the admission price policy of an exhibitor "would not only affect the film rental in" the theatre making the change, "but it would also affect . . . the film rental in the subsequent theatres, because if the prior-run theatres reduce their admission prices, then the subsequent theatres could not continue to charge the admission prices that they have been charging" (R. 726).

sions on the basis of the minimum admission prices specified or any higher admission prices actually charged (G. X. 289-290). In other words, the royalty which he has to pay the distributor is measured by a percentage of the admission price charged at the time the license is made.

The minimum admission price provision in Universal's licenses is, therefore, a covenant against change of position, and the remedy given to the distributor is not damages for breach of contract, but, at his election, the power to terminate the license, or to adjust its terms to what they would have been had the licensor been advised of the licensee's intention prior to the making of the license.

In exhibiting the copyrighted motion picture through the use of the positive print which has been bailed to him, the exhibitor performs the very acts he is licensed to perform. The restriction against reducing his regularly charged admission price is, therefore, in the strictest sense a limitation upon the grant.

In asserting that such limitation is wholly legal,* Universal relies upon *Bement* v. *Harrow*, 186 U. S. 70 (1902), *U. S.* v. *General Electric*, 272 U. S. 476, and the numerous cases which follow them, but in view of the fact that the licensor in those cases, unlike our case, was permitted to fix the price on articles to which the licensee at all times had title, in view of the further fact that Universal's licensees do not compete with it so long as they conform to the terms of their licenses, in view of the further fact that Universal merely provided against change in a price position already

*It is important to note that despite the fact that the Consent Decree was intended to correct the licensing practices in the industry deemed by the Government to be forbidden by the Sherman Act, it contains no restriction whatsoever against the licensor's prescribing minimum admission prices (R. 3373 *et seq.*).

assumed by the licensee, and the still further fact that Universal's copyrights completely cover the feature picture licensed, Universal believes that its position is very much stronger. It is in fact merely exercising its right to license in such a way as to exclude competition from its licensees engaged in a separate branch of the business.

The *Bement* and *General Electric* cases involved patent licenses to make, use and vend. This Court held that it was legal for the patentee to forbid its licensee to undersell it, when disposing of articles it, the licensee, had itself made, and therefore at all times had title to. The rationale thereof was that the patentee might require of a licensee, even a competitor, that he stipulate not to compete with him, except to the extent authorized, e.g., that he would not compete in respect of price.

3. Clearance.

It is well settled that a patentee may transfer the "exclusive right" given to him by the statute, by assigning the same to another, or by licensing the exclusive exercise of the same to another. *Bement* v. *National Harrow Company*, 186 U. S. 70, 94; *Virtue* v. *Creamery Package Company*, 227 U. S. 8, 36-7; *Independent Wireless Telegraph Company* v. *Radio Corporation of America*, 269 U. S. 459, 469-73; *United States* v. *General Electric Co.*, 272 U. S. 476, 489; *Becton, Dickinson & Co.* v. *Eisele & Co.*, 86 F. (2d) 267 (C. C. A. 6th), certiorari denied 300 U. S. 667.

It has never been questioned, so far as we know, but that a copyright owner may do likewise, and, as heretofore pointed out, this Court has definitely approved the validity of an exclusive license under copyright in *Interstate Circuit Inc.* v. *U. S.*, 306 U. S. 208, pp. 227-8.

The exclusive license, whether under a patent or under a copyright, is an agreement with the licensee that no others will be licensed, and that he alone may exercise the rights licensed to him under the statutory monopoly. *Overman Cushion Tire Co.* v. *Goodyear*, 59 Fed. (2d) 998 (C. C. A. 2nd), certiorari denied *Kelly-Springfield Tire Co.* v. *Overman*, 287 U. S. 651.

It is likewise well settled that the owner of a patent or copyright monopoly may refrain from exercising his rights thereunder, or from licensing others to do so. Thus Chief Justice Holmes, speaking for an unanimous court in *Fox Film Corporation* v. *Doyal*, 286 U. S. 123, p. 127 said:

"The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. Compare *Continental Paper Bag Co.* v. *Eastern Bag Co.*, 210 U. S. 405, pp. 422, 424."

In *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, this Court said:

> "A patent owner is not in the position of a quasi-trustee for the public or under any obligation to see that the public acquires the free right to use the invention. He has no obligation either to use it or to grant its use to others. If he discloses the invention in his application so that it will come into the public domain at the end of the 17 year period of exclusive right he has fulfilled the only obligation imposed by the statute. This has been settled doctrine since at least 1896. Congress has repeatedly been asked, and has refused, to change the statutory policy by imposing a forfeiture or by a provision for compulsory licensing if the patent is not used within a specified time. The governing rule is quoted in *Chapman* v. *Wintroath*, 252 U. S. 126, at 137, 64 L ed 491, 495, 40 S Ct 234:

'A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions not of natural but of purely statutory right. Congress, instead of fixing seventeen, had the power to fix thirty years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public.' *United States* v *American Bell Teleph. Co.*, 167 U. S. 224, 247 42 L ed 144, 156, 17 S Ct 809."

In licensing its copyrighted feature motion pictures in a series of exclusive runs, followed by clearance periods agreed upon with the licensee, in aid of the exclusivity, Universal was clearly within its legal rights, since such arrangements diminish the exclusivity it is legally entitled to give, i.e., exclusive rights for the duration of the copyright. If, by reason of its statutory monopoly, it can properly agree with its licensee that it will never license anyone else, it can certainly agree that following an exclusive right for a limited time, and in aid thereof, it will not license anyone else for a further limited period of time, particularly since it is, at no time, required to license anybody.

4. Royalties measured by a percentage of the licensee's selling price.

This was the method of measuring royalties employed by General Electric in its license to Westinghouse (15 F. (2d) 715, 718) which was approved by this Court in *U. S. v. General Electric Company*, 272 U. S. 476. It is a widely used method of measuring royalties, and is particularly

appropriate to the motion picture business in view of the impossibility of estimating the public appeal of a feature picture. Likewise it is the fairest method for both the distributor and the exhibitor, since the royalty paid is in proportion to the success of the picture.

5. Long term agreements to grant exclusive licenses for limited periods on all Universal feature pictures made with exhibitors operating a number of theatres.

Exclusive licenses under patents and copyrights, which may include a number of patents or copyrights, frequently run for the duration of the statutory monopolies. In the case of an exclusive license, the licensor is thus committed to the licensee to exclude all others for a long period of years in respect of the patents or copyrights.

In licensing its copyrighted pictures, Universal frequently made agreements committing its numerous statutory monopolies, produced over a period of years, to the exclusive use of particular licensees, for relatively short periods of time in successive runs. There is, we submit, no logical basis for differentiating between the two situations. Restraint and legally permissible discrimination are the essence of both. *U. S.* v. *United Shoe Machinery Co.*, 247 U. S. 32, 57.

Likewise a patentee may legally license his patent or patents to a manufacturer who has numerous factories in which he proposes to manufacture the patented article, or even to such a one who completely dominates the business. Such manufacturer may have a great competitive advantage over other licensees who have only one factory, in being enabled to manufacture more cheaply, etc. It is submitted, however, that the patentee's action is perfectly legal, and that there is no logical basis for differentiating between it

and the practice of Universal in licensing an exhibitor who operates a number of theatres.

6. Block-booking.

As defined by the court below "block-booking" includes the connotation of conditioning the licensing of one picture upon the acceptance of others (R. 3696, 3515, 3659-60). There is no evidence that Universal indulged in any such practice. It merely licensed that exhibitor who was willing to take the greatest part of its pictures at a satisfactory price (R. 1468-1473). Assuming the contrary, however, its action would be legal since it is a non-monopolistically situated distributor, and the practice was not shown to have any unreasonably restrictive effects. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 428; *Federal Trade Commission* v. *Paramount Famous Lasky Corp.*, 57 F. (2d) 152 (C. C. A. 2nd, 1932).

I.

A LICENSOR OF COPYRIGHTED FEATURE MOTION PICTURES, INSTEAD OF EXERCISING HIS FULL LEGAL RIGHT TO GRANT AN EXCLUSIVE LICENSE UNDER COPYRIGHT, LIMITED ONLY BY THE DURATION OF THE COPYRIGHT, MAY LEGALLY GRANT AN EXCLUSIVE LICENSE FOR A LIMITED PERIOD OF TIME, AND AGREE, IN AID THEREOF, THAT IT WILL NOT GRANT ANY FURTHER LICENSE DURING A GIVEN PERIOD OF TIME THEREAFTER.

1. An agreement for clearance is legal.

Despite the contention of the Government to the contrary, the above stated proposition would appear to be axiomatic. The owner of a copyright monopoly is not con-

fronted with an all or nothing option. He may, it is true, agree with a particular licensee that he shall have a completely exclusive license for the duration of the copyright monopoly, i.e., that he, as the licensor, will license no one else during the term of the copyright. *Overman* v. *Goodyear, supra.* This is the most he can give. On the other hand, the simplest logic dictates that the owner of a copyright monopoly may choose to exploit his statutory grant through a series of exclusive licenses, each limited in time, and separated by time intervals during which it is agreed, in aid thereof, that no one be licensed. The agreement with the licensee here is no different in character than in the case of a completely exclusive license. It is merely more limited.

That such arrangements are legal has been uniformly* held. *Westway Theatre* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md. 1940), affirmed on opinion below in 113 F. (2d) 932 (C. C. A. 4th, 1940); *Gary Theatre Co.* v. *Columbia Pictures Corporation*, 180 F. (2d) 891 (C. C. A. 7th, 1941); *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F. (2d) 600; and Opinion below, R. 3531. The Government, moreover, agreed in Sec. VIII of the Consent Decree (R. 3380) that "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

The Government apparently does not contend that the owner of a copyright to a motion picture cannot grant an exclusive license under his statutory monopoly, as is standard practice in the case of a patent. Approval of such practice, under Sec. 1 of the Copyright Act, is explicit in *Interstate Circuit, Inc.* v. *U. S.*, 306 U. S. 208, pp. 227-8,

*The government's references (bf., pp. 84, 98) to clearance restrictions "prohibited" by the *Interstate Circuit* case (306 U. S. 208) find no support in that decision.

wherein it is said that *"the owners of the copyright of a motion picture film acquire the right to exhibit the picture and to grant an exclusive or restrictive license to others to exhibit it."* (Emphasis ours.)

If a copyright owner may grant an exclusive license, it is obvious that he may grant something less than such an exclusive license, to wit, an exclusive license for a limited time, with protection thereafter, in respect of licenses to others, for a limited time. In granting an exclusive license, either for the duration of his copyright or for a limited time, the licensor agrees with the licensee that he will not license the motion picture, under the copyright, during the duration of the license, to any competitor of the licensee. In the case of the exclusive license for a limited period of time, it is denied by the Government that the licensor may agree with the licensee that he will not license a competitor of the licensee until after the lapse of a given period of time after the end of the limited period of time for which the license is granted. Since, however, as above explained, the licensor may agree with the licensee never to license anyone else under the copyright, the logical absurdity of the Government's argument is evident. The agreement attacked as illegal is palpably less restrictive and discriminatory than the exclusive license agreement which, it must be admitted, is legal. As was said by this Court in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 57:

> "Of course, there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention, absolutely *or on the terms the patentee chooses to impose.* This strength is the compensation which the law grants for the exercise of invention. Its exertion within the field covered by the patent law is not an offense against the Anti-Trust Act." (Emphasis ours.)

The owner of a copyright monopoly has a legal right to exploit it to the best advantage. Unlike the owner of a patent monopoly, who frequently makes use of exclusive licenses, the owners of copyright monopolies in feature motion pictures have found that the most advantageous way of exploiting their legal monopolies is through granting a succession of licenses for limited times, first to the higher-class theatres, then to the next best theatres, and so on down the line until the poorest theatres are reached, with agreed-upon time intervals in between each run to protect the exclusivity of the prior-run theatres.

Although the use of this method is to some extent dictated by consideration of the prohibitive expense,* running into the millions of dollars, which would be involved if thousands of positive prints (instead of the hundreds that are presently made) had to be made of each negative in order to service all of the many thousands of theatres which might desire to exhibit the picture at one time, if thus released, (R. 1895-9), the principal reason for licensing in a sequence of runs is proper exploitation of the picture to yield the most revenue.

The largest revenue-producing theatres are the first-run theatres, to which the highest admission prices can be charged. These theatres are the best appointed and most luxurious playhouses, and therefore cost the most to build and operate (pp. 5-6, *ante*). That a premium price is in order for the first opportunity to view a motion picture after release is evident (R. 418-9). For later exhibitions, a lesser price has to be charged in any event. No apology need be made for the obvious fact that the more people

*The cost of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800 (R. 670-1).

who can be induced to view a particular picture in the first-run theatres at the highest prices, the greater the revenue of both the distributor and the exhibitor. The exclusive right to show a motion picture immediately after release is a valuable right, and by virtue of the copyright monopoly a distributor is entitled to set up his licenses in such a way as to make his aggregate revenue from all showings of the picture as great as possible. He endeavors to do this by inducing as many patrons as possible to view the picture in first-run theatres, and clearance is one of the principal means employed (R. 422-3, 705-7, 1091, 1085-6, 2011, 1899-1923).

The advertising value of a first-run exhibition to subsequent-run exhibitors is very great. If a motion picture is a success in the leading first-run metropolitan theatres, its success is assured in the subsequent runs. The distributor and the first-run exhibitor, therefore, spare no effort and expense, through advertising and exploitation, to induce as many persons as possible to view the picture in the first-runs. This not only augments the revenue of the first-runs but greatly benefits the subsequent-runs, whose box-office receipts are increased by advertising and exploitation which costs them nothing (p. 10, *ante*).

The subsequent-run exhibitor, naturally enough, wants to pay as little as possible for his pictures, to benefit as much as possible from first-run advertising and exploitation before it is dissipated, and to draw as much as possible on the patronage counted upon by the first-runs. The shorter the clearance the more successful he will be. Hence it is apparent that his demand for "reasonable" clearance, about to be discussed, is based upon economic, not legal considerations.

2. Clearance, in conjunction with an exclusive license for a limited time, is a diminution of exclusiveness, and need not be "reasonable".

The Court below conceded the propriety of clearance agreements, overruling the contentions of the Government in this respect (F. F. 78, R. 3674). It held, however, that clearance must be "reasonable," although it did not indicate what criteria of reasonableness should be, except that the clearance granted "should not be in excess of what is reasonably necessary to protect the licensee in the run granted." (Decree II, 4, R. 3695-6). This concept of "reasonableness," as applied to clearance, contradicts the basic concept of the right to grant an exclusive license under copyright for the term of the copyright, and we believe it to be completely untenable. So far as we are aware, no other judicial decision gives credence to the idea that a clearance, viewed by itself and apart from the exclusive license for a limited time which it is granted to protect, must be reasonable, particularly that it must be reasonable in the light of the licensee's requirements, or those who expect to be licensed later on, not those of the owner of the copyright. In so holding, the Court below relied upon cases approving agreements under the general law, by vendors of income-producing property not to compete with the vendees for a given time within a given area, but not involving copyright or patent monopolies, such as *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179. (Opinion below, R. 3530-1). Obviously a purchaser of property has much more limited rights in obtaining protection from his vendor against competition than the licensor under a statutory monopoly has to restrict his licensee from competing with him, since the last-named restriction may clearly be absolute.

Clearance, as heretofore pointed out, in conjunction with an exclusive license for a limited time, represents a diminution of the usual rights of the one who grants an exclusive licensee, not an expansion. Those subsequent-run exhibitors who protest against "unreasonably" long clearances have no standing to protest, because the only rights they have, or may have, emanate from the copyright owner, who can divide his statutory monopoly as he sees fit with whom he sees fit. Their protests arise out of economic considerations, and have no legal basis. Clearance is not a restriction upon the prior-run licensee, although it cuts down the rights which *may* be given him by an exclusive license. It is likewise not a restriction upon subsequent-run licensees, who always take subject to what has been given to the prior-run licensees. If, however, it was a restriction, the only judicial criterion of which we know to test its legality would be that all types of restrictions may be imposed under statutory monopolies which are "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly," and clearance obviously is. *General Talking Pictures Corporation* v. *Western Electric Co.*, 305 U. S. 124, p. 127, approving *U. S.* v. *General Electric Co.*, 272 U. S. 476. If the type of restriction is justified, we know of no limitations upon the degree to which it may be employed. The subsequent-run exhibitor is no more entitled to complain than any member of the public who may be refused a license under a patent or copyright. His complaint amounts to nothing more than that he thinks he has paid too much for the picture in view of the prior-run's clearance. He is asserting his belief that he ought to pay less or that the clearance should be less.

Nor, aside from the legalities of the situation, does the subsequent-run exhibitor have any justifiable complaint.

He gets precisely what he pays for. Instead of paying the large film rentals, often running into thousands of dollars, which the prior runs have to pay, he may pay as little at $10 to $15 flat rental, and generally pays very much less than the cost of striking a positive print of the picture (R. 1898, 671). At the same time he gets the benefit, without cost, of the extensive advertising and exploitation engaged in by the prior runs, and need therefore himself expend very little if anything on advertising.

3. The idea that clearances must be "reasonable" originated in a waiver of legal rights by the major defendants (but not Universal) in the Consent Decree.

This idea of the Court below concerning the required reasonableness of clearances evidently had its origin in the Consent Decree, one of the chief purposes of which was to settle the complaints of independent exhibitors. In summing up Government counsel contended that clearances were "principally in the hands of theatre operators rather than distributors" (R. 2574). While the Government contended that clearances had been fixed by combinations and conspiracies among such theatre-operators, both major and independent, which would, of course, be illegal, whether reasonable or unreasonable, the decision of the major defendants to settle the complaints by arbitration under the Consent Decree is otherwise readily explicable. These complaints were essentially economic, not legal, in nature. Having licensed a picture at a particular price the independent exhibitor naturally desired: (1) to cut in on the prior-run business as much as possible; and (2) to participate as much as possible in the benefits of the exploitation and advertising of the picture by the prior-runs before it became dissipated.

His complaints about "unreasonably" long clearance therefore really were nothing more than complaints that his bargain was not good enough.

This proceeding was instituted by the Government through the filing of a petition in 1938. In 1940 the five major defendants entered into a Consent Decree with the Government (R. 3373). Universal was not a party to these arrangements (R. 3373). This Consent Decree was, of course, a compromise between the contentions of the Government and those of the major defendants. In Sec. VIII thereof (R. 3379-80) provision was made for the settlement of clearance disputes between the major distributors and independent exhibitors. Clearance agreements were recognized as "essential in the distribution and exhibition of motion pictures," but the parties to the Consent Decree agreed that clearances should be reasonable "as to time and area," and as to the factors to be taken into consideration in determining such reasonableness.

The Consent Decree set up an arbitration system under the supervision of the United States District Court with an Appeal Board. It was provided that when any clearance was questioned as unreasonable, the arbitrator should have the power to make findings as to whether or not it was unreasonable, and if found to be such, to make an award fixing the maximum clearance between the theatres involved.

Among the factors to be considered by the arbitrators in the determination of reasonable clearances (R. 3380) were (1) the historical development of clearances in the particular area wherein the theatres involved are located; (2) the admission prices of the theatres involved; (3) character, location and operating policy of the theatres involved; (4) the status of the theatres involved as revenue-producers

to the distributors; (5) extent of competition between the theatres; and (6) all other business considerations except affiliation with a distributor or with a circuit of theatres.

The Decree appealed from does not lay down any such criteria for the determination of reasonable clearance. Indeed, it lays down as its sole criterion (R. 3695-6) the requirements of the licensee for protection (a matter which would appear to be inadmissible as the exclusive guide for a distributor under the holding of this Court in *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208), and not normal and reasonable adaptation to the securing of reward by the copyright owner.

In the Petition which it filed in 1938, and in the Amended and Supplemental Complaint (R. 3137) the Government claimed, *inter alia*, that the major defendants were monopolizing the exhibition of motion pictures, and were dominating the motion picture industry through concertedly imposing unreasonable restrictions of interstate commerce upon independent exhibitors and the public. Among such restrictions claimed to have been illegally imposed through concerted action were clearances. The Consent Decree provisions respecting clearance represent, therefore, a compromise between the Government and the major defendants. What is incorporated in the Consent Decree with respect to clearance has, therefore, no necessary relation at all to what the law actually is. The major defendants were willing, for reasons best known to themselves, perhaps no more than to get the very numerous independent exhibitors off their necks, to consent to the determination by arbitrators of "reasonable" clearances, thus waiving the right each had under copyright to independently fix, in negotiations with exhibitors, such clearances as it might see fit.

The Consent Decree, therefore, by agreement between the major defendants and the Government, established an arbitration tribunal to function in much the same manner as the Interstate Commerce Commission, through Congressional edict, functions in the determination of reasonable rates. The principal function of the Interstate Commerce Commission is to determine what is reasonable in the way of rates, taking into consideration the varying interests of the railroads, the shippers and the public. The arbitration tribunals set up under the Consent Decree, considering the various factors specified therein, determined what, *in their opinion*, was reasonable in the way of clearance, in respect of the varying interests of the distributor, exhibitor and public. Their powers were solely derived from the agreement between the Government and the five major defendants, embodied in the Consent Decree, and cannot, we submit, be applied by the Court, without Congressional sanction, to a non-consenting defendant.

Under Article V of the Decree issued by the Court after trial, which abandons the arbitration system (R. 3700), no impartial tribunal can function to determine the reasonableness of clearance as among the distributor, exhibitor and public. Thus, even assuming that it were the law that a distributor is limited to reasonable clearance, which we think it clearly is not, the concept is impossible of practical administration except by an administrative agency created by Congress. Under the Decree, as laid down by the Court, the distributor and exhibitor deal at arm's length. Neither can be expected to impartially consider the relative needs of the other, or of the public. The law is, we submit, that the distributor who possesses a statutory monopoly is required to consider only his own needs, provided he acts independently.

4. There is no proof that Universal granted any "unreasonable" clearances.

Only one exhibitor testified in the case, and he was called by a defendant. He did not complain of "unreasonable" clearance (R. 1379-1404).

The decisions of the Appeal Board in arbitrations, which reduced various clearances, and which were admitted in evidence with considerable hesitation against the major defendants, were not admitted against Universal, since it was not a party to the Consent Decree (R. 308).

Thus there is no evidence at all binding upon Universal that any Universal clearance was unreasonable, even in the opinion of some arbitrator or the Appeal Board, much less by admeasurement in accordance with legally prescribed criteria. Even as against the major defendants there is nothing more than the opinion of the members of the Appeal Board to that effect, employing criteria agreed upon between the Government and major defendants only, and not incorporated into the final decree.

The Decree (II, 4) requires that a distributor justify the "reasonableness" of any clearance attacked. Owing to the lack of prescribed standards, and the fact, as heretofore pointed out, that "reasonable clearance" is an economic, not a legal concept, such justification is, we submit, impossible,* aside from the fact that it would seem clear that Congress alone can relieve a plaintiff of the burden of proof which is ordinarily his.

*At the hearing upon the Government's motion for a temporary injunction the following colloquy took place between Judge Goddard and Government counsel:

> The Court: I wish one of the first things you would do is to define affirmatively what unreasonable clearance is.
>
> Mr. Wright: That is something that most of us have been struggling with for years without getting very satisfactory results (R. 3453).

II.

UNIVERSAL'S LICENSES UNDER COPYRIGHT TO INDEPENDENT EXHIBITORS, NOT CLAIMED BY THE GOVERNMENT TO HAVE PARTICIPATED IN ANY CONSPIRACY TO MONOPOLIZE OR RESTRAIN INTERSTATE COMMERCE UNDER THE SHERMAN ACT, LEGALLY RESTRICTED THE GRANT IN REQUIRING THE LICENSEES TO REFRAIN FROM COMPETITION WITH THE LICENSOR WHICH WOULD RESULT IN DEPRECIATING OR DESTROYING THE VALUE OF THE LICENSOR'S RESIDUARY INTEREST IN MAKING SUBSEQUENT-RUN LICENSES.

1. **While the decree recognizes the right of large distributors, who own theatres, to control the admission prices charged therein, it inconsistently prevents Universal, a medium-sized distributor without theatres, from protecting its revenue by a covenant against the lowering, during the run of a feature picture licensed by it, of admission prices fixed by exhibitors.**

Paragraph IV of the Decree (R. 3700) reads as follows:

> "Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and *upon such terms, and subject to such conditions as may be satisfactory to it*, in any theatre in which such distributor defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries." (Emphasis ours.)

Under this provision of the Decree the major defendants as distributors, may license their pictures to their subsidiary exhibition companies for exhibition in any of the theatres which they own, and may freely specify the admission prices

to be charged therefor to the public. The Decree, however, prohibits a non-integrated medium-sized distributor, such as Universal, from licensing its copyrighted pictures, even to an independent theatre not claimed to be implicated in any monopolizing, on condition that such theatre shall not reduce its current admission price during the run of the picture.

Thus Universal, a medium-sized distributor without theatres and no potentialities for monopolizing by itself, cannot, in contractual dealings with a small exhibitor, and in order to protect its revenue and to prevent the depreciation or total destruction of the value of its residuary interest in respect of the making of subsequent-run licenses, do the same things which the five largest distributors in the business, in their dealings with their controlled exhibition units, may freely do—and, absent conspiracy or monopolizing, should have the right to do. This despite the fact that neither the non-integrated distributor nor the small exhibitor, or both combined, can, by any conceivable stretch of the imagination, impose their will upon competition.

2. A licensor under copyright, having the right to exclude all others completely, may let down the bars and permit competition against himself to the extent he sees fit, and, in requiring the maintenance of current admission prices, Universal so acted.

In exploiting its copyrighted feature motion pictures, Universal elected, as it was entitled to do, to license the same in a series of runs, with agreed-upon time intervals in between runs, instead of granting simultaneous non-exclusive licenses to many theatres, or exclusive licenses for the duration of its copyrights to one or more theatres. The amount of revenue drawn to the box office in each of these runs,

and consequently the film rental Universal receives, obviously depends upon the admission price charged and the number of people paying that admission price during the run. It is, of course, highly important to Universal that the showings of its feature pictures first-run should be successful, and it could therefore be expected to select the best-equipped and best-managed theatres for that run. These theatres were, of course, those which could successfully charge the highest admission prices. Universal would naturally give to these theatres clearance over succeeding runs, sufficient to permit them to recoup their film rentals and make a reasonable profit, at their regularly charged admission prices. The gross receipts at such first-run theatres being the greatest, it followed that Universal would obtain the largest film rentals therefrom. Such film rentals were necessarily based upon the expected revenue-producing capacity of such first-run theatres, at the admission prices which they had been charging prior to the making of the license, and, in the case of percentage contracts, upon the actual box-office receipts.

Following the first-run, Universal, of course, contemplated the licensing of second, third and fourth-run theatres, and other subsequent runs. In each successive run, as heretofore explained (pp. 5-7, *ante*), the quality of the theatres licensed would depreciate, and with such depreciation of quality, the admission price charged would decrease. Thus in licensing a first-run theatre, and in agreeing to accept a certain amount of film rental therefrom, Universal necessarily had in mind the licensing of many other theatres on many other runs.* Its first-run

*The income from such runs "may mean the difference between black or red ink on his ledgers." T. N. E. C. Monograph No. 43.

license, being limited in time, expressly reserved the right to grant subsequent-run licenses following the first-run, after the expiration of the clearance period (pp. 5-7, *ante*, G. X. 289-290).

The first-run theatre had, in each instance, set its own admission price, which it believed to be appropriate, in view of its appointments, policy of operation, etc. (F. F. 63, R. 3670; 433, 718, 968, 999, 1382-3). Such admission price is necessarily always a very important factor in inducing any distributor to license a particular theatre first-run as against competing theatres, and properly so, in view of the distributor's clear legal right to exploit its statutory monopoly to the best advantage. Reduction of such admission price would mean instant depreciation of the value of the subsequent-run licenses remaining for disposition in Universal's hands, or even destruction thereof. This for the reason that the price differential existing between the admission prices of the first-run theatre and each of the subsequent-runs was of the greatest importance to such subsequent runs, for with any lessening in the disparity between such admission prices, the first or prior-run theatre would invade to a greater or less extent the lower-price patronage counted upon by the subsequent-run theatres (R. 726-7, 1984, 2112). It is to a considerable extent on the basis of such disparities that clearances are fixed (R. 1085-6, 1091).

It is, therefore, clear that when Universal required prior-run theatres to maintain their current admission prices as a minimum, during the run of the licensed picture, it was entitled, as a licensor under copyright, to do so, in order to prevent such licensees from competing with it *pro tanto*,

and depreciating or destroying the value of the subsequent-run licenses it planned to make.*

As this Court pointed out in *General Talking Pictures Co.* v. *Western Electric Co.*, 305 U. S. 124, p. 127, and as the *Bement, General Electric,* and multitudinous other cases cited later herein, show, a restrictive license is clearly legal, so long as the conditions upon which it is granted are not inconsistent with the scope of the monopoly. The restrictions here in question are palpably consistent therewith. The essential quality of any monopoly is the power to fix the price, which in a legal monopoly becomes the right to fix the price. When, therefore, a licensee is granted permission to share in the legal monopoly, it is plain that his participation can be limited *pro tanto* by a price restriction.

One who gives a license under a monopoly is not required to permit the licensee to compete with him to the fullest extent possible, but for the most obvious reasons may restrict the licensee's competition with him to any extent he pleases, just as he may elect to totally forbid all competition with him; or to relax such prohibition in respect of particular persons.** It is foolish to contend that the prohibition against competition with the owner of the copyright may be relaxed in respect of particular persons and not as to others, but must be relaxed, if at all, in the case of a particular licensee, to the fullest extent. This is plainly not so.

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*In *Schine Chain Theatres Inc.* v. *U. S.* (No. 10, Oct. Term, 1947), Government counsel conceded at the trial that "there is clearly no conflict with the Sherman Act" in licensing pictures with minimum admission prices, so long as the restraint is reasonable (Schine Record, R. 493-4).

**In addition it is clear enough that the exhibitor's ability to pay the film rental bargained for may be seriously impaired by a reduction in his admission price, while at the same time the reputation of the picture being shown may be seriously injured.

The foregoing argument is directly supported by *Bement* v. *National Harrow Co.*, 186 U. S. 70 and *U. S.* v. *General Electric Co.*, 272 U. S. 476, which 25 years after the decision in the *Bement* case unanimously approved it.

3. The licensor does not extend the scope of its monopoly because it does not interfere at all with the price charged for entertainment it does not supply.

The admission price fixed by the exhibitor, and required to be maintained by the distributor, is a *minimum price*. In other words, the distributor requires that at least as much as this be charged to view the exhibition of its copyrighted picture, irrespective of what other pictures are shown or entertainment provided. The exhibitor is entirely free to add to this *minimum price* any amount he sees fit to compensate him for the additional pictures or entertainment provided. The Government, however, treats the case as though a definite price had been fixed by the licensor for all the entertainment provided, which is clearly contrary to fact.*

4. Limited licenses under copyrights, the purpose of which is to restrict the licensee from competing in some specified manner with the licensor, are legal.

Licensing of this character under patents has been uniformly approved by the Courts, and never disapproved, so far as we know, in respect of copyrights. The controlling principles are obviously no different, as heretofore pointed out (p. 41-3 *ante*).

*In *Interstate Circuit* v. *U. S.*, 306 U. S. 208, 228, this Court said "we have no occasion now to pass upon these or related questions."

(a) IN GENERAL:

General Talking Pictures Corp. v. *Western Electric Co.*, 305 U. S. 124, 127; *Becton, Dickinson & Co.* v. *Eisele & Co.*, 86 F. (2d) 267, 268-270 (C. C. A. 6th), certiorari denied 300 U. S. 667; *Owens Bottle Co.* v. *Libbey Glass Co.*, 9 F. (2d) 564, 565 (C. C. A. 6th); *Innis, Speiden & Co.* v. *Food Machinery Co.*, 2 F. R. D. 261, 262-264 (D. Del.); *Wilson* v. *Rousseau*, 16 U. S. 225 (1845); *Burr* v. *Duryee*, Fed. Cas. No. 2190 (C. C. D. N. J., 1862); aff'd. 68 U. S. 531 (1863); *Steam Cutter* v. *Sheldon*, Fed. Cas. No. 13,331 (C. C. D. Vt., 1872); *Dorsey* v. *Bradley*, Fed. Cas. No. 4015 (C. C. N. D. Ill., 1886); *American Refining Co.* v. *Gasoline Products Co.*, 294 S. W. 967 (Tex. Civ. App. 1927).

(b) DELIMITATION OF TERRITORY IN WHICH LICENSE IS OPERATIVE:

See *Hobbie* v. *Jennison*, 149 U. S. 355, 363-4; *Cincinnati Siemens-Lungren Gas Illuminating Company* v. *Western Siemens-Lungren Company*, 152 U. S. 200, 205; *St. Louis Street Flushing Machine Co.* v. *Sanitary Street Flushing Machine Co.*, 178 Fed. 923, 926-927 (C. C. A. 8th).

(c) LIMITATION OF QUANTITY WHICH MAY BE MADE;

Mitchell v. *Hawley*, 16 Wall. 544, 546, 548-9; *Aspinwall Manufacturing Co.* v. *Gill*, 32 Fed. 697, 698 (C. C. D. N. J.); and *Goshen Rubber Works* v. *Single Tube Automobile & Bicycle Tire Co.*, 166 Fed. 431, 432 et seq. (C. C. A. 7th).

(d) RESTRICTION TO ARTICLES OF PARTICULAR TYPE OR CHARACTER:

Bement v. *National Harrow Company*, 186 U. S. 70, 72-75, 90; *Cinema Patents Co., Inc.* v. *Columbia Pictures Corporation*, 62 F. (2d) 310, 311-312 (C. C. A. 9th); *Pope Manufacturing Co.* v. *Owsley*, 27 Fed. 100, 104 (C. C. N. D. Ill.); *George Close Co.* v. *Ideal Wrapping Mach. Co.*, 29 F. (2d) 533, 534-535 (C. C. A. 1st); and *Good Humor Corporation of America* v. *Popsicle Corporation of United States*, 59 F. (2d) 344 (D. Del. 1932).

(e) RESTRICTION AS TO USE FOR WHICH ARTICLES MAY BE MANUFACTURED:

Rubber Company v. *Goodyear*, 9 Wall. 788, 799; *Vulcan Mfg. Co.* v. *Maytag Co.*, 73 F. (2d) 136, 138-139 (C. C. A. 8th), appeal dismissed 294 U. S. 734; and *Sinko Tool & Mfg. Co.* v. *Casco Products Corporation*, 89 F. (2d) 916-918 (C. C. A. 7th).

(f) RESTRICTION TO PARTICULAR TYPES OF MARKETS:

See cases cited, *supra*, under (d) and (e), and also *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 179-182, and 305 U. S. 124, 127; *Westinghouse Electric & Mfg. Co.* v. *Tri-City Radio Electric Supply Co.*, 23 F. (2d) 628, 630-631 (C. C. A. 8th); *Libbey Glass Co.* v. *McKee Glass Co.*, 216 Fed. 172, 176 (W. D. Pa.), affd. 220 F. 672 (C. C. A. 3rd), certiorari denied 238 U. S. 624; and *Radio Craft Co.* v. *Westinghouse Electric & Mfg. Co.*, 7 F. (2d) 432 (C. C. A. (3rd)).

(g) RESTRICTION OF SELLING PRICE OF ARTICLES MANUFACTURED UNDER LICENSE TO VEND, USE AND SELL:

Bement v. *National Harrow Co.*, 186 U. S. 70 (1902); *U. S.* v. *General Electric Co.*, 272 U. S. 476 (1926); *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7th, 1907); *Indiana Mfg. Co.* v. *J. I. Case Threshing Machine Co.*, 154 Fed. 365 (C. C. A. 7th, 1907); *Goshen Rubber Works* v. *Single Tube A. & B. Tire Co.*, 166 Fed. 431 (C. C. A. 7th, 1908); *Massie* v. *Asbestos Brake Co.*, 123 Atl. 155 (Ct. of Chancery, N. J., 1922); *Casco Products Corp.* v. *Kenny*, 24 U. S. P. Q. 171 (S. D. N. Y., 1935); *Straight Side Basket Corp.* v. *Webster Basket*, 82 F. (2d) 245 (C. C. A. 2nd, 1936); *American Lead Pencil Co.* v. *Musgrave Pencil Co., Inc.*, 170 Tenn. 60; 91 S. W. (2d) 573 (1936); *Ceramic Process Co.* v. *Cincinnati Advertising Prod. Co.*, 28 F. Supp. 794 (S. C. Ohio, 1939); appeal dismissed, 116 F. (2d) 497 (C. C. A. 6th, 1940); *General Electric Co.* v. *Willey's Carbide Tool Co.*, 33 F. Supp. 969 (W. D. Mich., S. D., 1940); *United States* v. *Wayne Pump Co.*, 44 F. Supp. 949 (N. D. Ill., 1942); appeal dismissed, 317 U S. 200 (1942); *United States* v. *Line Material Co.*, 64 F. Supp. 970 (E. D. Wisc., 1946); *United States* v. *United States Gypsum Co.*, 67 F. Supp. 397 (Statutory Court, D. C., 1946).

Nearly all of the foregoing cases involved plural licenses.* Particular reference is made to the *U. S. Gypsum*

*In its opinion (R. 3528) the Court below, while conceding that a single license of this kind might be legal, condemned the method of licensing because "other licensors and exhibitors are always in contemplation." Apparently it meant that Universal knew that other licensors were also employing the restriction, and that Universal was licensing many exhibitors. The legal significance of this, however, we are unable to understand, since Universal cannot prevent the former and cannot avoid the latter.

and *Line Material* cases. The well-settled rule is stated in the Restatement of the Law of Contracts by the American Law Institute as follows:

> "A, a proprietor of a patent, licenses C, D, and E to manufacture the patent article and to sell it for not less than a stated price. The condition of the license fixing the price is not illegal." (Illustration 12, Section 515).

5. The doctrine of the *Bement* and *General Electric* cases.

In *Bement* v. *National Harrow Co.*, 186 U. S. 70 (1902), a case decided after the enactment of the Sherman Act, this Court held in a unanimous decision that a patent licensor might legally prohibit his licensee from selling at a lower price than the licensor's.

At p. 88 this Court pointed out that the plaintiff was the absolute owner of a monopoly recognized by the Constitution and by the statutes of Congress, and that the Sherman Act clearly did not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon a licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and price to be demanded therefor (p. 92).

It held at p. 93 that the provision in regard to price was "an appropriate and reasonable condition", *since the owner of the patented article might charge such price as he chose and could license another on condition that he sell at a specified price.* (Emphasis ours.)

In 1926, in *U. S.* v. *General Electric Co.*, 272 U. S. 476, the doctrine of the *Bement* case was attacked by the Government, and unanimously sustained.

In this case the General Electric Company, which owned three important improvement patents on the making of the modern tungsten incandescent lamp, licensed the Westinghouse Electric and Manufacturing Company to make, use and vend incandescent lamps under such patents. It restricted Westinghouse from selling such incandescent lamps, however, for more than it, the licensor, might charge. Westinghouse manufactured and sold incandescent lamps under this license, and the United States brought a proceeding to restrain General Electric and Westinghouse on the ground that they were violating the Sherman Act.

This Court held that the restriction contained in the license was valid, after pointing out that it was well settled that where a patentee makes the patented article and sells it, he can exercise no further control over what the purchaser may do with the article after his purchase. It noted, however, that the question before it was a different one "which arises when we consider what a patentee who grants a license to one to make and vend the patented article may do in limiting the licensee in exercising the right to sell". In this connection it said that if the licensor went further than to grant a license to make and use, and granted a license to make, use and sell, he might limit the selling price, because such a condition of sale would be "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly" since "one of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory" (pp. 489-90).

Thus "when the patentee licenses another to make and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will

necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain by making them and selling them myself' " (p. 490).

It was claimed in the *General Electric* case that the *Bement* case had been in effect overruled. It was expressly held, however, that the overruling of *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, by *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, and the disapproval of the so-called *Button Fastener* case* in the *Motion Picture Patents* case, did not carry with it the overruling of the *Bement* case, and said that "The price at which a patented article sells is certainly a circumstance having a more direct relation and is more germane to the rights of the patentee than the unpatented material with which the patented article may be used. Indeed, as already said, price-fixing is usually the essence of that which secures proper reward to the patentee" (pp. 491-4).

6. Subsequent decisions of this Court cast no doubt on the Bement and General Electric doctrine.

The unanimous decisions in *Bement* v. *Harrow*, and *United States* v. *General Electric* have not been limited or questioned by this court. The *Bement* case was referred to in *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 338, 345 (1908), but it was distinguished as not involving any question of resale prices; it was referred to with apparent approval in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373,

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*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288.

401 (1911); it was referred to with approval by Mr. Justice White in his dissenting opinion in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, 61 (1912); it was distinctly reaffirmed in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 39-40 (1912); and its doctrine was applied in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 58 (1918).

The *General Electric* case was cited with approval in *Carbice* v. *American Patents Development Corp.*, 283 U. S. 27, 31 (1931), and it was expressly approved and applied in *General Talking Pictures Corp.* v. *Western Electric Co.*, 305 U. S. 124, decided in 1938, where the Court stated at page 127:

> "That a restrictive license is legal seems clear. *Mitchell* v. *Hawley*, 16 Wall. 544. As was said in *United States* v. *General Electric Co.*, 272 U. S. 476, 489, the patentee may grant a license 'upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.'"

It was also cited with apparent approval and distinguished in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 228 (1939), and in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 456 (1940), where the Court again stated the well recognized rule as follows:

> "The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using or selling his invention. R. S. § 4884, 35 U. S. C. § 40, * * * He may grant licenses to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by

> attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give."

In the *Ethyl* case the Court held that the effort to fix the resale price of jobbers was improper, but no question was raised as to the provision in the licenses to the refining companies by which the licensees were required to sell their ethyl gasoline "at a certain fixed price differential above the average net sales price of the licensees' best non-premium grade of gasoline" (309 U. S. at 448).

Similarly, in two recent cases involving situations which were held to amount to resale price maintenance, this Court was careful to distinguish such situations from the right of a licensor to fix the original sale prices of its licensees. Thus, in *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252 (1942), the Court stated:

> "There is thus no occasion for our reconsideration, as the Government asks, of *United States* v. *General Electric Co., supra*, on which appellees rely. The Court in that case was at pains to point out that a patentee who manufactures the product protected by the patent and fails to retain his ownership in it cannot control the price at which it is sold by his distributors (272 U. S. at 489)."

And in *United States* v. *Masonite Corp.*, 316 U. S. 265, 277, 278 (1942), the Court again said:

> "We do not have here any question as to the validity of a license to manufacture and sell, since none of the 'agents' exercised its option to acquire such a license from Masonite. Hence we need not reach the problems presented by *Bement* v. *National Harrow Co.*, 186 U. S. 70, and that part of the

> *General Electric* case which dealt with the license to Westinghouse Company. * * * As Chief Justice Taney said in *Bloomer* v. *McQuewan*, 14 How. 539, 549, when the patented product 'passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.'"

Thus, it can be seen that this Court has carefully distinguished the *Bement* doctrine from the illegality found in such cases as the *Carbice* and *Mercoid* cases, in which unpatented devices, processes or materials were tied in to the use of the patented device or process, and from the cases above cited in which the control of the resale prices of patented articles was condemned, and from such situations as those involved in the *Standard Sanitary* case and the *Masonite* case, in which there was concerted action among competitors.

Since 1925, the Government has in a number of recent cases urged this Court to overrule the *General Electric* case; for example, in *U. S.* v. *Univis*, *U. S.* v. *Masonite*, and the *Line Material* case, *supra*, but so far without success. It has also unsuccessfully urged Congress on a number of occasions to abolish the right to grant limited licenses; for example (Senate Document No. 95, 76th Congress, July 17, 1939). The National Planning Commission in its report submitted to Congress by President Roosevelt on June 18, 1943, stated that the proposal to outlaw such limitations in patent licenses "would not be a beneficial innovation in our patent system." (House Document No. 239, 78th Congress, First Session; see page 9.)

It has sometimes been suggested that the doctrine of the *General Electric* case is to be restricted to a single license

from the patent owner, since only a single license to Westinghouse from General Electric was involved in that case. Numerous cases, as above pointed out, hold this contention to be unsound. Yet it is apparently approved in the Decree of the Court below which forbids a defendant to engage in a system of clearances with exhibitors, it being admitted that the granting of clearance is valid.

It is also to be noted that in the Court's opinion (R. 3528), it declined to decide "whether a copyright owner might lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation." It seems to conclude that it is the making of many licenses which is illegal, but in its decree enjoins the fixing of any minimum admission price (R. 3695).

But Judge Stephens stated for the statutory court in *U. S.* v. *U. S. Gypsum Co., supra,* at pages 431-2:

> "It can make no difference so far as the Sherman Act is concerned whether the patentee licenses no one, or licenses one, two, three, four, five, or six or a dozen, others. Putting this otherwise, if the patent laws, despite the Sherman Act, do not legitmatize a monopoly in the manufacture and sale of a patented product by a patentee-licensor and several licensees, they cannot legitimatize a monopoly by the patentee-licensor and one licensee or by the patentee alone, because in each instance the exclusion of the public from manufacture, use or sale within the field marked out by the patent is exactly the same, i.e., complete. Once it is recognized that a patentee may divide his monopoly, no limit can reasonably be put upon the number of persons he may see fit to license, provided always the terms and conditions of the licenses do not go beyond those which normally and

reasonably secure the rewards of a patent monopoly. If in the *General Electric* case the Court had held that the patent laws do not permit any division of his monopoly by a patentee and had therefore stricken down the Westinghouse license (and the additional non-price-fixing licenses), General Electric itself would then have been in control of all of the manufacturing, using and selling of the electric lamps covered by the patents. Although but one price fixing license happened to be involved in the *General Electric* case, it would be an irrational fixation to construe the decision of the Court as limiting licensing under price fixing restrictions to one competitor, since the public is equally excluded and equally subjected to the patentee's price whether there is no license, one licensee or many. Cf. *United States* v. *Line Material Company*, 64 F. Supp. 970 (D. C. Wis. 1946); Laurence I. Wood, Patents and Anti-Trust Law (C. C. H. 1942) 182-3."

7. This is an a fortiori case.

In the *Bement* and *General Electric* cases the licensor was permitted to regulate the sales price of articles made by a licensee, and consequently at all times owned by it. In our case the licensee never owns anything. That which is regulated is the exercise *per se* of the intangible rights licensed under copyright.

In the *Bement* and *General Electric* cases the licensor enforced his own price. In our case all that the licensor does is to ban a change in the licensee's price, which transforms the licensee from a non-competitor into a competitor with the licensor.

Nor can any question arise in this case as to the price being fixed on an article not completely covered by the statu-

tory monopoly, which was one of the points made by the Government in its argument in the *Line Material* case. 9

8. The arrangement would be lawful even if the feature pictures were not copyrighted.

In *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, this Court said:

> "In accordance with these principles it is well settled that a stipulation by a vendee of any trade, business, or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as to not to interfere with the value of the trade, business, or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding."

The decisions in *Fowle* v. *Park*, 131 U. S. 88; *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6th, 1898), decree modified and aff'd 175 U. S. 211, and *Cincinnati Packet Co* v. *Bay*, 200 U. S. 179, are of similar purport, and these principles apply with special force to dealings in feature motion pictures which are the originations of the licensor, and would not exist save for his efforts. That he temporarily bails a positive print of the picture in order to permit the exercise of the intangible exhibition rights, instead of selling the print, makes the case considerably stronger for the application of these principles, and the fact that the licensor grants exclusive licenses limited in time, thus reserving the right to make subsequent-run licenses,

clinches the case, we submit, for the licensor's right to protect himself.

That the law is well-settled to the effect that he has such right clearly appears from Sec. 516 of the Restatement of the Law of Contracts of the American Law Institute, which provides that "The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly: * * * (b) a bargain by the buyer or lessee of property or of a business not to use it in competition with or to the injury of the seller or lessor."

III.

THE ROYALTY FOR A LICENSE UNDER COPYRIGHT IS PROPERLY MEASURED BY A PERCENTAGE OF THE GROSS RECEIPTS.

When an exhibitor pays a flat rental for a license under copyright to exhibit a feature picture which may or may not be a success in his theatre, he assumes a fixed charge which may exceed his overhead and expenses for additional entertainment for the period of exhibition. Percentage contracts relieve him from this danger. He pays in accordance with the picture's success. This is eminently fair both to the distributor and the exhibitor.

Such percentage contracts are frequently used in connection with the rental of store properties, and no method of measuring royalties would seem to be more equitable or appropriate than a specified percentage of the licensee's selling price. While it gives the licensor an interest in the success of the licensee's business, any royalty arrangement dependent upon the quantity of business done by the licensee

would do likewise, e.g., a provision for the payment of some flat amount per unit of sales, which undoubtedly is one of the standard methods of measuring royalties under patents. Indeed, in view of the fact that the minimum admission price is pegged, that is what the percentage arrangements in our case amount to.

So obviously proper is this arrangement that the Government conceded the fact in the *General Electric* case, as shown by the following statement in the lower court's opinion (*U. S. v. General Electric Co.*, 15 Fed. (2d) 715, 718):

> "The other provisions of the license are not unusual, except the exaction of 10 per cent. royalty on all sales above 15 per cent. of the total sales of electric lamps having tungsten filaments, and only of 2 per cent. royalty on a total business of 15 per cent. or less. As to this provision, government counsel conceded on the hearing that it is only reasonably necessary to the protection of the business of the owner of the patent."

Moreover the arrangement upheld in *Standard Oil Co. v. U. S.*, 283 U. S. 163, at pp. 172-175, would seem to make ours an *a fortiori* case. There it was held that it was legal for three of the largest integrated oil companies and a patent holding company, owning patents for the "cracking" of gasoline, but not dominating the production of the total supply of gasoline, to cross-license each other and to provide for the division of royalties accruing to each from their licensing of third parties.

IV.

IT IS CLEAR THAT UNIVERSAL, WHEN LICENSING UNDER COPYRIGHT TO INDEPENDENT EXHIBITORS, NOT CLAIMED BY THE GOVERNMENT TO HAVE PARTICIPATED IN ANY COMBINATION OR CONSPIRACY TO MONOPOLIZE OR RESTRAIN INTERSTATE COMMERCE, WAS ENTITLED TO LICENSE AS MANY OF ITS PICTURES AT ONE TIME UNDER ONE CONTRACT, TO AN EXHIBITOR OPERATING ONE OR MORE THEATRES, AS A LICENSEE WAS WILLING TO TAKE; OR EVEN TO CONDITION THE LICENSING OF ONE PICTURE UPON THE ACCEPTANCE OF OTHERS (OF WHICH THERE WAS NO EVIDENCE AGAINST UNIVERSAL), AND WAS LIKEWISE ENTITLED TO COMMIT ITS PICTURES TO SUCH LICENSEES FOR A TERM OF YEARS.

We later herein discuss the legality of a non-monopolistically situated distributor's conditioning the licensing under copyright of one feature picture upon the licensee's willingness to take one or more other copyrighted feature pictures. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. (2d) 152 (C. C. A. 2). Since it is our contention, and we believe it to be entirely clear, that there is no evidence in the record that Universal followed such a practice, we presently confine the discussion to the group-selling procedure actually followed by Universal, as shown by the evidence. This was to offer all of its pictures in a group, and to license that exhibitor among competing exhibitors, who, other things being equal, was willing to accept the greatest number thereof (R. 1468-73). Moreover lots of exhibitors obtain selective contracts, which means that they need only accept a certain specified number of the pictures in the group, and most exhibitors obtain the right to cancel a certain proportion of the pictures licensed (R. 1469).

1: It is mutually advantageous for non-integrated distributors and independent exhibitors to make wholesale deals in feature pictures.

As heretofore pointed out, the great majority of Universal's feature pictures have been in the medium and lower-quality brackets. The demand for such pictures is naturally greatest among the rank and file theatres, which are preponderantly independent. Such theatres are in competition with the theatres affiliated with the major defendants, and with theatres in the large independent chains possessing great buying power. The uncontradicted testimony is that the buying and selling of feature pictures in groups is advantageous alike to the distributor and the exhibitor who does not possess the buying power to command a wide choice of product.

Montague, Columbia's sales manager, testified (R. 1258-59): "It is my belief that it (group-selling) is the most satisfactory method of distribution to the exhibitor. By that means the exhibitor knows that he has a certain program that is his, he knows what price the pictures are coming to him at, and he feels that he is having some insurance as against his investment in brick and mortar. We are quite certain that the majority of the exhibitors in the United States desire to buy that way."

He further testified (R. 1275): "A lot of these exhibitors would like not only to buy 44 (feature pictures) but they would like to buy 84, if we have them, because they need the film. They are changing in these towns—some of them use as many as six, and some eight and 12 pictures a week, if they have a double bill. They need these pictures. If you try to take them away and give them to somebody else in that town, you see the squawk they put up, be-

cause they feel that is their measure of protection and they want it."

Rodgers, Loew's sales manager, testified (R. 427) as follows concerning the same subject: "Well, in the first place they seem to think, I believe, that they can buy them cheaper, No. 1; and secondly, and of equal importance, is that it permits them to have a sort of a sense of security; if they would have a year's product at one time it would relieve them of the necessity for buying each month or each two months."

Scully, Universal's sales manager, testified (R. 1470) that "the exhibitors like to be assured of a constant flow of pictures. Sometimes they cannot get all of the good pictures or buy all of the good pictures, and they like to buy as many pictures as they can, so if sometimes they didn't have a good picture they might play one that is not so good, and they generally like to buy as many as they can, and they generally contract for all your pictures, with the right to select what they think they can absolutely use."

There was no contradiction of any of this testimony.

Likewise group-selling is "absolutely vital and absolutely necessary" to distributors situated like Columbia and Universal. Montague testified in this connection (R. 1258), "If we were to change our method of distribution to the so-called small group-selling which is used under the consent decree,* we would find it absolutely necessary to change the whole financial base of our company. We would not have—we do not have enough money to keep pictures in inventory, such as we would have to do, for any period of time. We find it absolutely necessary to turn our pictures over as rapidly as possible, to send that money back to California, so California can again invest it in pictures."

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*Not more than 5 feature pictures at a time (R. 3375).

2. Offering to license and licensing pictures in groups is entirely legal.

There is no evidence at all in this record that any exhibitor asked Universal for the privilege of licensing fewer pictures than it did license, and was refused. In response to questions from the Court, Government counsel in summation admitted that a distributor has the right to prefer a licensee who wants several pictures over a licensee who wants only one (R. 2755-7). He claimed that legality depended upon the method used in getting the particular customer to take more than one (R. 2756), but, in so far as Universal is concerned, had offered no evidence as to the method used, to wit that there was any conditioning. Moreover, as Judge Hand observed, when there is the right to reject a certain number of pictures "that is not really block-booking" (R. 2736).

The contention that conditioning is illegal was rested by Government counsel on the contention "that a copyright-owner in dealing with copyrights does not have the same freedom of contract that somebody dealing in uncopyrighted material would have," when Judge Bright suggested that his argument "would prohibit any merchant from selling to a big buyer on better terms than he does to a small buyer" (R. 2756).

It is certainly strange doctrine that a copyright owner, who possesses statutory monopolies is more limited in his rights than he would be without them. If he could not offer several copyright licenses at the same time, or even at different times not very far apart, without being charged with conditioning, he would be in a sorry fix indeed. The Federal Trade Commission, indeed, in the *Paramount Famous-Lasky* case, *post*, pp. 88-90, did not question the right to do this.

3. The conditioning of the licensing of one picture upon the licensing of another is legal in the case of a non-monopolistically-situated distributor.

The Court below analogized this practice to that of tying in unpatented materials to the use of process and machine patents, and held it a violation of the Sherman Act on the authority of the *Carbice, Morton Salt, Motion Picture Patents* and *Mercoid* cases (R. 3543), without any showing that it substantially lessened competition or tended to create a monopoly.

This holding of the court below was in direct conflict with *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 428 wherein the majority thought the practice so clearly lawful that it dismissed the Commission's complaint. Mr. Justice Brandeis, dissenting, however, held that the particular circumstances should be controlling, and noted that the most important fact would be the extent to which the seller dominated the market. Obviously Universal cannot dominate the market.

The *ratio decidendi* in *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. (2d) 132, (C. C. A. 2) is the same, and this case absolved the defendant in connection with the precise practice complained of here, despite Paramount's far greater importance in the business than Universal's.*

In the *Paramount Famous-Lasky* case the only point at issue was the legality of "block-booking", and there was a carefully reasoned opinion concurred in by the whole Court.

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*The Commission found that the Paramount corporation was "the largest and strongest competitor in the trade," and that its power was so great that all competitors followed its trade practices.

The Federal Trade Commission had taken a great deal of evidence on the practice, and the Court therefore had full and complete data on the exact nature of what was done and with respect to its effects upon exhibitors and the public. The record relating to this subject was 669 pages long. Many witnesses testified that they had been refused the right to buy less than all the pictures. Others testified that the prices of pictures wanted by them were increased 50, 75 or even 100% over the price *en bloc*. In contrast the subject received little or no attention in the evidence in our case, in which no witnesses testified that they were refused the right to buy only such pictures as they wanted.

Although the Court below states (R. 3542), "In many cases licenses for all the films had to be accepted in order to obtain any", it gives no record references, and support in the record is definitely lacking as to Universal. All that appears is that Universal customarily offered its pictures in groups in the first instance. That it was frequently unsuccessful in selling the entire group is obvious, and Scully, Universal's sales manager, testified (R. 1469): "A lot of exhibitors buy half of our product and some buy a little more". He further testified that: "Quite a lot of exhibitors have selectivity. Most of the exhibitors insist upon right of cancellation of a certain group of our product".

That the offering of feature pictures in blocks does not necessarily by any means result in all of them being sold can also be seen from Montague's testimony (R. 1272): "We attempt to sell our entire product at one time, but it is only a small percentage of the theatres in the United States that we succeed in doing that. It usually ends up with the exhibitor having a selective contract".

Mochrie, RKO sales manager, testifying concerning his experience in selling blocks of five feature pictures under

the Consent Decree, stated that he sold them all if he could and less if he could not, saying (R. 1691): "In the case of the best picture I was successful in selling 14,000 theatres. In the case of the poorest of that block I was successful in selling only 6,250 theatres. So there were many, many theatres that I did not sell that poor picture to".

All of this means that Universal sold as many pictures at one time as an exhibitor was willing to buy.

But even if it did more than this, of which there is no evidence, and conditioned the licensing of one picture upon the acceptance of others, reason, as well as authority, suggests that there is no extension of the statutory monopoly when no more is done with two or more copyrights than can be legally done by a non-monopolistically situated distributor with non-copyrighted articles. If this were not so, George Bernard Shaw could not legally sell a book containing more than one of his copyrighted plays.

The cases relied upon by the court below, in which patent monopolies were extended by requiring unpatented materials supplied by the patentee to be used in conjunction therewith, merely denied the patentee the right to sue others supplying like materials to the licensees, for contributory infringement. They leave open the question of whether under the particular circumstances of each case violation of the Sherman or Clayton Acts took place, by reason of a substantial lessening of competition or tendency toward monopoly. Clayton Act, Sec. 3 (15 U. S. C. A., Sec. 14). *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3. Thus they did not at all justify the court below in concluding that the mere fact of the conditioning resulted in a violation of the Sherman Act. In *International Salt Co.* v. *U. S.*, No. 46, October Term, 1947, decided November 10, 1947, this

court found that the Sherman and Clayton Acts had been violated in the particular situation, in which the largest domestic manufacturer of salt required its licensees of salt-utilizing machines to use its salt only. The Court acted, however, only upon the express finding that there had been action to foreclose competitors from a substantial market, that the volume of business affected by the tie-in contracts was substantial, and that the tendency of the arrangement to the accomplishment of a monopoly was obvious.

Our case is totally different. Universal is by no means the largest producer and distributor in the industry. It does, on the contrary, only a small part of the business, and very little of that in the high-quality feature picture field. There has been no lack of run-of-the-mine pictures such as Universal has specialized in. Its business reasons for endeavoring to license its season's product as a block, before production, are obvious, since the licensing of run-of-the-mine pictures one by one, after production, would be exorbitantly expensive and highly speculative.* Equally obvious are the business reasons for its customers wanting to stock up for an entire season so that they will not run short of pictures.

No claim can be made that Universal "block-booked" in combination or conspiracy with any of the other defendants, and the Court's conclusion of law is expressly limited to concluding that Universal violated the Sherman Act by "inviddually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, * * *" [R. 3693]. "Block-booking" is not part of the combination and conspiracy found to fix minimum admission prices, runs and clearances.

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*We can think of no other industry which produces articles costing hundreds of thousands of dollars each without orders in advance for the same. It would in fact be foolhardy to do so.

The major defendants, indeed, have been operating for years under the restrictions of the Consent Decree authorizing them to license in blocks of not more than five feature pictures. United Artists sells picture by picture. Hence Columbia is the only other defendant concerned in the charge of "block-booking." Certainly it will not be claimed that Universal conspired with Columbia in this connection. On the contrary, it is obvious that both of these companies by offering a season's product at one time enabled the small exhibitors to satisfy their requirements and more effectively compete with their larger rivals.

In the case of a patented machine or process, it is easy to see that its use may be so important, in respect of the saving of time and money, that processors cannot effectively compete without having a license to use the machine or process. The patentee, therefore, if permitted to require its licensees to use its unpatented materials as a condition of a license to use its patented process or machine, is in a strategic position to monopolize the sale of such unpatented materials. In the case of copyrighted feature pictures, however, the copyright owner has no such power. His statutory monopoly extends only to the particular productions which he has copyrighted. The number of such productions which may be created is unlimited. He is in the same position, therefore, as is an owner of particular chattels, who necessarily has a monopoly over the particular chattels, but not over the production and sale of any other chattels of like kind.

The Court below wrongly thought that conditioning in the case of copyrights differed from conditioning in the sale of chattels which it impliedly conceded to be legal, "because it extended a monopoly which the owner of chattels is not assumed to have" [R. 3545]. In fact, however, as hereto-

fore pointed out, this is exactly what the owner of particular chattels does have. "All the Copyright Act does is to create a form of property in the literary or artistic production of the author or artist. The Act attaches to the product of his brain certain attributes of property. One of these is the right of exclusive use similar to that attaching to physical property. * * * The monopoly, so-called, amounted to nothing more than the attaching to the work of an author or composer or producer of motion pictures of the same rights as inhere in other property under the common law." *Interstate Circuit* v. *U. S.*, 306 U. S. 208 at p. 236.

The Opinion below relies (R. 3545) upon a statement in *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436, at p. 459; but it is not in point. There the defendant made its only profit by selling to refiners a patented fluid for incorporation into gasoline, the treated gasoline being in turn sold by them to jobbers. It attempted to keep up the price obtained by it for the patented fluid by maintaining, primarily and directly for the benefit of the refiners, the resale price charged by the jobbers for treated gasoline which it had licensed the refiners to make and sell to licensed jobbers and the jobbers to sell under another of its patents. This was held to be illegal price-fixing in that the patentee, having reaped its reward by selling the patented fluid was attempting to augment it by restricting its licensees, who paid no royalties, in exercising dominion over treated motor fuel which they had lawfully made or acquired, not in its own interest but in that of the refiners.

It is sometimes contended that block-booking leads to the placing of bad pictures along with the good, and should be prohibited because thus constituting an injury to the public. No evidence was taken on this subject. All of the evidence was to the effect that the exhibitors wanted the

pictures they licensed, undoubtedly for the reason that they were the kind of pictures their audiences wanted to see. We believe this Court ought not to and will not concern itself with esthetic, intellectual or cultural standards in the production of motion pictures, when considering a charge of Sherman Act violation. Nor is the claim by any means to be taken as necessarily true, for it is equally arguable that the licensing of pictures in groups makes it possible for producers, who have the means, to experiment with a certain number of pictures conforming to high cultural standards, which they would not otherwise do if their pictures had to be licensed one by one to exhibitors, who would judge each of them strictly in accordance with box-office possibilities.

4. Master contracts are legal.

Nor can there be anything illegal under the Sherman Act, insofar as Universal is concerned, in licensing its feature pictures to an exhibitor who operates a chain of theatres, which are not engaged in a combination and conspiracy to monopolize and restrain interstate commerce, any more than it is illegal to sell supplies to a corporation operating numerous factories in competition with corporations operating only one factory. Ability to buy at wholesale may, it is true, give certain advantages to the large theatre chain, but this cannot be something with which the law should concern itself, as far as the licensor is concerned. He is merely dealing with the market as he finds it, and obtaining for himself good outlets for his pictures for at least a few years. His situation, after making such contracts, is distinctly less favorable than that of the major distributors, who have permanent controlled outlets.

To hold otherwise would mean that any supplier or licensor in deciding whether or not to deal with a user would

have to determine at his peril whether or not the user could possibly use the materials supplied or the copyrights licensed to the disadvantage of his competitors.

5. Franchises are legal.

When feature pictures are committed for more than one season to a licensee, the contract is known as a franchise. This differs only in degree from the licensing of a season's product. The vast majority of Universal's franchises are made with independent exhibitors, some 727 of such franchises being in existence at the time of the trial as against 43 franchises with affiliated exhibitors. (R. 1472-84, Ex. U-2.)

In attempting to place its feature pictures against the competition of five major distributors and five other national distributors, Universal is very often unable to obtain the representation it would like in particular places. (R. 1472-1483.) In situations in which a large theatre chain was dealing with its competitors and not with it, Universal encouraged competing exhibitors to expend moneys in improving their theatres to convert them from second or subsequent-runs to first-runs. Such theatres sought franchises from Universal in order that they might be assured of its product over a period of years, without which assurance their new investment could not have been justified (R. 1480, 1483). In granting such franchises, it is obvious that Universal's action was counter-monopolistic.

Even where no copyrights are involved, it is thoroughly established that long-term supply contracts, whether to dispose of the entire output of a producer, or to supply the entire requirements of a purchaser, or for the supplying of exclusive agents in particular territories, are not illegal, certainly not illegal *per se*, under the Sherman Act. *Match Corpora-*

tion of America v. *Acme Match Corporation*, 285 Ill. App. 197, 1 N. E. 2nd 867; *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933);* *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923); *Moon Motor Car Co. of N. Y.* v. *Moon Motor Car Co.*, 29 F. (2d) 3 (C. C. A. 2d, 1928); *Kelly-Springfield Tire Co.* v. *Bobo*, 4 F. (2d) 71 (C. C. A. 9th, 1925), cert. denied, 268 U. S. 694; *Carter-Crume Co.* v. *Peurrung*, 86 Fed. 439 (C. C. A. 6th, 1898); *Great Western Distillery Products* v. *John A. Wathen Distillery Co.*, 10 Cal. (2d) 442, 74 P. (2d) 745 (1937); *New York Bank Note Co.* v. *Kidder Press Co.*, 192 Mass. 391, 78 N. E. 463 (1906); *Southwest Kansas Oil & Gas Co.* v. *Argus Pipe Line Co.*, 141 Kan. 287, 39 P. (2d) 906 (1935); *American Sand & Gravel Co.* v. *Chicago Gravel Co.*, 184 Ill. App. 509 (1914); *Heimbuecher* v. *Goff, Horner & Co.*, 119 Ill. App. 373 (1905); *Over* v. *Byram Foundry Co.*, 37 Ind. App. 452, 77 N. E. 302 (1906); *Excelsior Quilting Co.* v. *Creter*, 36 Misc. 698, 74 N. Y. Supp. 361 (Sup. Ct. N. Y. Co. 1902); *Blauner* v. *Williams Co.*, 36 Misc. 173, 73 N. Y. Supp. 165 (Sup. Ct. N. Y. Co. 1901); *English Hop Growers* v. *Dering*, (1928) 2 K. B. 174.

Indeed, exclusive agency arrangements are one of the leading categories of reasonable restraints of trade set forth in the Restatement of the Law of Contracts, Ch. 18, Sec. 516, and in Williston on Contracts, Sec. 1645. The reasons for considering such restraints to be reasonable are well stated by Judge Rifkind in *U. S.* v. *Bausch & Lomb Optical Co.*, 45 Fed. Supp. 387, at pp. 388-389, aff'd 321 U. S. 707.

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*In this case 137 competing coal producers granted exclusive selling rights to a selling agency. Yet no illegality was found.

If a supplier may legally enter into a requirements contract with another, or contract to dispose of his entire output, or make an exclusive agency agreement with him, without violating the Sherman Act, even when no rights under a statutory monopoly are involved, it is obvious that a copyright owner may *a fortiori* enter into an exclusive licensing arrangement covering a term of years for its copyrighted feature pictures. Such an arrangement, indeed, is the regular practice in connection with patents when an exclusive license is entered into for the duration of the patent or a lesser term.

The Government contended throughout the case that small exhibitors were at a great disadvantage *vis-a-vis* the theatres in large circuits, whether affiliated or independent, and one of the principal objects of this proceeding was to remedy, to the extent possible, the patent inequalities existing between the bargaining positions of the circuit theatres and that of the small exhibitors. In extending the prohibition against future franchises to those with small exhibitors, the decree frustrates a principal objective of the Government's.

The Amended and Supplemental Complaint (hereinafter sometimes called the complaint) at the very out-set, paragraph 17 (R. 3144-5), draws a sharp distinction between a "circuit theatre" and an "independent theatre". The former is defined as a member of a "theatre circuit" which in turn is defined as "a group of more than five theatres, owned, controlled or managed by the same person, partnership or corporation; or a group of more than five theatres which combine with each other, through a common agent, in licensing film". An "independent theatre" is any theatre which is not a member of a "theatre circuit" as thus defined.

The issue presented by the Government in respect of the legality of franchises is solely with respect to franchises made by distributors with large "theatre circuits". It points to such franchises, indeed, as one of the outstanding methods by which discriminatory privileges have been obtained by the theatres in large theatre circuits to the prejudice of the small exhibitor.

The decree, nevertheless, condemns franchises of any length, however free of restrictive characteristics and irrespective of whether or not they are granted to the smallest exhibitor or the largest theatre circuit. This provision goes far to defeat the purposes of the Government in instituting this proceeding, since the small exhibitor urgently needs commitments of pictures if he is to have any hope of competing with circuit theatres. If the small exhibitor has to bid picture by picture in competition with circuit theatres, having much greater buying power, and, in the case of the affiliated chains, having assurance of a large amount of good product, he can, to say the least, have no assurance of product whatsoever with which to run his theatre. While we can see no reason at all why a distributor which owns theatres should not be permitted to license its pictures thereto, the privilege thereby accorded is nothing less than the right to grant a permanent franchise, and it is most unjust that a medium-sized distributor, without theatres, should not be able to franchise competitors of the major defendants, who, unlike them, have no assured source of product. Thus instead of bettering the competitive position of the small exhibitor, the broad provisions of the decree with respect to franchises greatly worsen it.

The issue presented by the Government on the legality of franchises is set forth in paragraphs 121, 122 and 123 of

the Amended and Supplemental Complaint (R. 3176-7). These allegations deal exclusively with the abuse of franchises by the distributors "in their dealings with circuits", both affiliated and unaffiliated. It is alleged that "these franchises often discriminate against independent theatres whose buying power is small".

There is not a word of complaint about the granting of franchises of reasonable length to small exhibitors. The entire complaint concerns the prejudicing of small exhibitors by the granting of franchises to large circuits. It is thus plain that the Government does not complain about the franchise as an institution. In other words, what it really complains of is the ability of the large theatre circuits to obtain franchises from distributors by means of their great buying power.

Producers and distributors who have great financial resources can freely purchase and operate theatres in which to show their pictures. Producers and distributors with lesser resources must by and large achieve effective distribution of their pictures through contractual arrangements in the nature of franchises. In no other way can they be assured of the necessary "show-cases" for their pictures, and in no other way can the independent exhibitors be assured of the vitally necessary product with which to operate their theatres. Consider the position of a small business man who desires to borrow money from a bank to invest in an independent theatre. Could he possibly do so without some distributor's commitment of its pictures to him for a reasonable term of years? Would the bank be satisfied with his ability to get pictures bidding picture by picture against the members of the large theatre chains, with their great resources? We thing the answer is evident.

Part Two

ASSUMING *ARGUENDO*, THAT LARGE CIRCUITS OF THEATRES, AFFILIATED OR UNAFFILIATED WITH PRODUCER-DISTRIBUTORS, WERE ENGAGED IN COMBINATIONS AND CONSPIRACIES TO MONOPOLIZE AND RESTRAIN INTERSTATE COMMERCE, PURSUANT TO WHICH, BY VIRTUE OF THEIR DOMINANT POSITIONS, THEY WERE ABLE TO DETERMINE WHAT THEATRES SHOULD RECEIVE PRIOR RUNS, AND TO FIX CLEARANCES AND ADMISSION PRICES, NOT ONLY FOR THEIR OWN THEATRES BUT FOR SUBSTANTIALLY ALL OTHER IMPORTANT MOTION PICTURE THEATRES IN THE UNITED STATES, THIS DID NOT COMPEL UNIVERSAL TO CHOOSE BETWEEN (1) REFRAINING FROM OFFERING ITS FEATURE PICTURES TO SUCH THEATRES ON THE ONLY CLEARANCES AND AT THE ONLY ADMISSION PRICES POSSIBLE, AND, IN SO DOING, EXERCISING ITS ORDINARY RIGHTS UNDER COPYRIGHT AND THE GENERAL LAW, OR (2) BECOMING IMPLICATED IN SUCH ALLEGED COMBINATION AND CONSPIRACY.

In Part One of this brief we have dealt with the legality of Universal's licensing practices *per se*, and have therefore discussed these practices in connection with Universal's dealings with independent exhibitors, not alleged by the Government to have been engaged in any combination and conspiracy to monopolize or restrain interstate commerce, in order to disassociate the discussion of the legality of these transactions between a medium-sized non-theatre-owning distributor and small independent exhibitors, contracting parties not in competition with each other, from the consideration of what evidence there may be, if any, of the existence of a combination and conspiracy among such non-theatre-owning distributor and either the five major companies, who were engaged in production,

distribution and exhibition, or the large independent theatre chains.

In this Part Two of the brief we consider the legal effect of Universal's employing such licensing practices, heretofore shown to be legal in and of themselves, in its dealings with exhibitors affiliated with the major defendants, and in its dealings with large independent theatre chains, and of its licensing its feature pictures to either the best available markets, or the only available markets.

As heretofore pointed out, the Government's case against Universal, aside from the claimed illegality of its licensing practices, rests upon the following foundations: (1) that Universal did a high proportion of its business with theatres operated by the major defendants, and the large independent theatre chains, who were allegedly engaged in combinations and conspiracies to monopolize and restrain interstate commerce, and had thus allegedly obtained control of the best and most successful theatres, in which they had allegedly fixed runs, clearances and admission prices; (2) that Universal's failure to forego the use of such licensing practices, even assuming their legality *per se*, resulted in uniformity of action among the distributors, and "maintained" the runs, clearances and admission prices fixed by the circuits, to the detriment of independent exhibitors (Gov. Juris. St., p. 8).

The basic contention made herein is that Universal cannot be deprived of its legal right to license its pictures in the best, or only available, markets, in accordance with its right under the copyright statutes to make restrictive licenses, granting exclusive rights for limited periods, protected by clearance agreements, and its right thereunder, and under the general law, to license all of its pictures for a term of years to exhibitors operating chains of theatres, by

reason of the fact that such licensees may now be found to have been engaged in combinations and conspiracies to monopolize and restrain interstate commerce, pursuant to which they determined what theatres should have prior runs, and fixed clearances and admission prices in the domestic motion picture theatre market.*

The Court below found (F. F. 84, R. 3674) that "independent distributors", i.e., non-defendant distributors, "when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs and admission prices, to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs * * *". It did not explain why a non-theatre-owning defendant distributor such as Universal, differing from the "independent distributors" only in being somewhat larger, was in any different position, and we contend that it was not.

Even if it be assumed that Universal ought to have known that there was reason to believe, prior to this Court's so holding, that the major defendants, or large independent theatre chains, were engaged in combinations and conspiracies to violate the Sherman Act, it would not have become implicated in such combinations and conspiracies unless it "joined mind and hand" with the members thereof.

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*In the nature of things even a single theatre, engaged in no conspiracy, can fix its own admission price and dictate clearance and priority of run to a distributor, if it be the only high-class theatre in the locality, or the best one, as is very frequently the case. (See claims made in Gov. Bf., pp. 15-19). The R. K. O. brief expressly recognizes this power in the exhibitor when it says (p. 27) "The affirmance of the absolute prohibition on expansion thus wuld be equivalent to a judicial notice to all exhibitors in every state where R. K. O. now is without theatres that they could boycott R. K. O.'s product unless it was licensed to them at any terms they might set, with complete confidence that R. K. O. could not protect itself by acquiring its own outlets, * * *".

Licensing its pictures to such members in accordance with its legal rights is not such cooperation. *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 33-4; *U. S.* v. *Falcone*, 311 U. S. 205; *Direct Sales Co.* v. *U. S.*, 319 U. S. 703, 709-713

To hold otherwise, Universal submits, would mean that the existence of such a combination and conspiracy, or combinations and conspiracies, concertedly fixing the runs, clearances and admission prices of substantially all the important motion picture theatres in the United States, would effectively deprive Universal of its legal right to license its pictures to the best, or only available markets, in accordance with its well-established statutory rights under copyright and the general law, or permit the exercise thereof only at the certain risk of being implicated in such violations of law.*

The foregoing being true, it is plain that any uniformity of action on the part of Universal *vis a vis* the major distributors lacks significance, for, even absent conspiracy the admission price clauses heretofore discussed, requiring

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*How essential it is for Universal to deal with the affiliated theatres of the five major defendants, if the Government's claims are correct, appears from statements in the Government's brief. At page 47 it says:

> "No producer or distributor can succeed without access to a substantial number of the affiliated theatres of the five majors",

and claims (p. 56) that from ⅓ to ½ of a feature film's total domestic gross comes from exhibitions, ⅔ of which occur in affiliated theatres.

At page 61 it says: "These major theatre circuits are so powerful, so concentrated in the larger cities and so distributed geographically that no distributor can succeed without access to the markets which they represent."

the maintenance of current admission prices, would automatically create uniformity in the specification of admission prices, while the programming requirements of exhibitors and forces of competition would inevitably tend to produce uniform clearance.

V.

UNIVERSAL WAS FREE TO GRANT EXCLUSIVE AND RESTRICTIVE LICENSES OF THE CHARACTER HERETOFORE DISCUSSED, TO EXHIBIT ITS COPYRIGHTED FEATURE PICTURES, TO EXHIBITORS AFFILIATED WITH THE MAJOR DEFENDANTS, OR TO EXHIBITORS OPERATING LARGE INDEPENDENT THEATRE CHAINS, ASSUMED *ARGUENDO* TO HAVE BEEN ENGAGED IN COMBINATIONS AND CONSPIRACIES TO MONOPOLIZE AND RESTRAIN INTERSTATE COMMERCE, AND WAS LEGALLY ENTITLED TO NEGOTIATE FILM RENTALS, ON THE BASIS OF RUNS, CLEARANCES, AND ADMISSION PRICES FIXED BY THE LICENSEES, AND WHICH IT WAS UNABLE TO ALTER.

1. The large theatre circuits were basically responsible for any fixed system of runs, clearances and admission prices which may have existed, and Universal's position relative thereto was no different than that of non-defendant "independent" distributors.

The Court below found (F. F. 84, R. 3674) that "independent distributors", i.e., non-defendant distributors "were obliged to conform to a fixed scale of runs, clearances and admission prices if they wished to get their pictures shown upon satisfactory runs", and definitely implied; if it did not hold, that they were not co-conspirators. It nevertheless held that Universal, a non-theatre-owning defendant distributor was a co-conspirator, although employing the same practices as the so-called "independent distributors" (R.

918, 544-5), and selling the same markets, the sole difference being that it did a larger gross business.

If in fact, runs, clearances and admission prices in the domestic motion picture exhibition field were fixed, it is obvious that the large circuits, affiliated or independent as the case may be, were basically responsible therefor. This the Court below concedes (F. F. 69, R. 3672).

It found (F. F. 66, R. 3671) that "All of the five major defendants have a definite interest in keeping up prices in any given territory in which they own theatres, and this interest they were safe-guarding by fixing minimum prices in their licenses when distributing films to exhibitors in those areas".

It further found (F. F. 79, R. 3674) that "The *major defendants* have acquiesced in and forwarded a uniform system of clearances, and in numerous instances have obtained unreasonable clearances to the prejudice of independents". It further found (F. F. 88, R. 3675) "Clearances are given to protect a particular run against a subsequent-run", thus again viewing the matter from the standpoint of the self-protection of those having exhibition interests.

The case is no different in respect of the determination of first-run status. In 38 out of the 92 cities in the United States, having a population of over 100,000, all of the first-run theatres were operated by one or more of the major defendants. In 4 of such cities there were no affiliated first-run theatres, and in 50 of such cities there was competition between first-run affiliated theatres and first-run independent theatres (Ex. L-13).

Rodgers, Loew's sales manager, defined first-run theatres upon cross-examination by Government counsel (R. 561) as "The theatres which played the best pictures on the

first-run". No other witness disputed this definition, and it seems to be plainly the correct one. As we have heretofore pointed out, the distributors of the best pictures select as first-run theatres, for obvious reasons, those which are the best equipped, best managed, best located, having the most responsible operators, are most suitable for the exhibition of the best feature pictures, and therefore are able to charge the highest admission prices (pp. 5-7 *ante*).

It, therefore, inevitably follows that the determination as to the first-run status of a theatre is necessarily made by the joint or several decisions of those owning or operating the best theatres and controlling the distribution of the best pictures. Universal has no theatres at all, and distributes only a very small proportion of the quality pictures.* It is plain, therefore, that it cannot either make or materially influence such decisions.

It is, therefore, apparent from the foregoing that if, as asserted by the Government and denied by the defendants, runs were determined, and admission prices and clearances were fixed, in concert, the responsibility therefor is basically that of the large circuits, independent and affiliated. If such combinations and conspiracies existed, there was no necessity for bringing Universal into it, which in itself makes it highly unlikely that Universal was brought into it.

2. Universal was in no position to dictate admission prices to motion picture theatres.

Motion picture theatres require the product of several distributors upon which to operate (G. X. 428a, 432). As heretofore pointed out, it is not at all feasible as a practical

*"The major defendants as distributors have collectively controlled and still control the major part of the first-class film supply." Gov. bf, in No. 79, p. 130.

matter for theatre operators to change their admission prices from day to day, since the public would resent anything but a consistent admission price policy (p. 25, *ante*). What distributors seek to guard against, and as we have heretofore shown they are entitled to guard against, is a reduction in admission price after the license is made. It is out of the question for a non-theatre-owning distributor such as Universal, whose feature pictures are in keen competition for desirable playing time in particular theatres with the feature pictures of the other distributors, to seek to dictate to a theatre what admission price it should charge, not only for Universal's pictures, but, in view of the necessity of a consistent admission price, for the pictures of all other distributors. Thus whether or not admission prices in the domestic motion picture theatre market were fixed pursuant to combinations and conspiracies among large circuit operators and/or their affiliated producer-distributors, it is idle to suggest that Universal, having no theatres and releasing but a very small proportion of the quality pictures, could have had any material influence in the determination of such admission prices.

On the other hand, if the admission prices in the domestic motion picture theatre market were fixed pursuant to a combination and conspiracy to monopolize and restrain interstate commerce among the major defendants having aggregate assets totaling 25 times those of Universal (pp. 15-21 *ante*) and proportionate power, or by powerful independent chains, it is *a fortiori* clear that if Universal was to license its pictures at all in the best, or only available, markets, it would have no option but to accept their current admission prices as minimums. This being so, it is clear, we submit, that Universal, in exercising its legal right to make a restrictive license under copyright, was entitled to exact a

covenant from affiliated or independent chain theatres that the current admission price should not be reduced, to the injury or destruction of the value of the subsequent-run licenses it planned to make.

3. Uniform clearance is to be expected as a result of the programming requirements of exhibitors and competitive forces, and, to the extent it exists, furnishes no proof against Universal of participation in a combination and conspiracy.

We turn now to clearance. The licensed prior-run exhibitor has a vital interest in the extent of the clearance which the licensor grants to him, because it has a very direct bearing upon the number of people who will view the exhibition of the feature pictures in his theatre at the higher admission price he charges.

As heretofore pointed out, the distributor has the full legal right to grant under copyright a fully exclusive license for the duration of the copyright. In granting an exclusive license for a limited time, and in providing by agreement for a clearance period thereafter prior to the granting of a subsequent-run license, the distributor agrees to a much smaller degree of exclusivity than he is entitled to grant.

In deciding whether it is willing to grant a clearance requested by the exhibitor, the distributor naturally takes into consideration the fact that a long clearance will diminish the value to him of the subsequent-run licenses he plans to make, by delaying a prompt play-off and depriving the subsequent runs of some of their expected patronage. This is the same sort of thing that the distributor seeks to protect himself against when he exacts a covenant from the exhibitor not to reduce his current admission price.

It thus is evident that the only interest which the distributor has in the degree of clearance is in connection with the obtaining of the largest aggregate film rental from both prior and subsequent runs. This, of course, involves a question of judgment. Since, however, the distributor is legally entitled to grant a completely exclusive license for the duration of the copyright, his judgment as to what is best for his own interest is, we submit, not properly subject to attack.

The amount of clearance which a particular theatre requires over another theatre is influenced by a number of factors, such as their comparative admission prices, size, location, appointments, entertainment policy, extent of competion with each other, etc. These of course are the same whatever distributor it licenses from. Just as a theatre must, for practical reasons, maintain a consistent admission-price policy whatever distributor's pictures it is showing, there is an obvious practical reason why it should desire to buy its feature pictures on some uniform clearance basis from all distributors, to wit, the difficulty making up its programs if it did not.* In any event, since the prior run benefits by a larger clearance, it will certainly not willingly accept a shorter clearance from one distributor than another is willing to give.** Likewise non-uniform clearance

*The Government itself recognizes the fact that the exhibitor wants uniform clearance for it says in the amended and supplemental complaint (paragraph 119 R. 3176):

> "The dominant circuits in every exhibition area, whether they be affiliated or unaffiliated, in purchasing products *generally request* and secure *the same runs and the same protections from all distributors* * * *". (Emphasis ours).

**R. 1709.

would prejudice subsequent-run exhibitors against the pictures of those distributors granting clearances longer than their competitors against such exhibitors, and deprive them of an even flow of pictures. If therefore a distributor wants to license his pictures to a favorably situated theatre, as he invariably is anxious to do, he must necessarily meet his competition in respect of clearances.

It is, therefore, apparent that reasons quite apart from combination and conspiracy, to wit, ordinary business reasons and the necessities of competition, tend to induce uniformity in clearance, and it is settled law, of course, that combination and conspiracy ought not to be deduced from the mere fact of uniformity when the fact is fully explained by ordinary business considerations.*

The question of the inferences which may be drawn from evidence of uniformity in selling terms was first considered by this Court in *U. S. v. U. S. Steel Corporation*, 251 U. S. 417. The Government brought suit to dissolve the Steel Corporation and the various units whose stock it had acquired several years before, on the ground that they were "engaged in illegal restraint of trade and the exercise of monopoly". (*ibid.*, p. 436). It appeared that the Steel Corporation upon its organization had acquired over 50% of the total domestic and foreign business in its field, and that it had been organized for the purpose of monopolizing and restraining trade, but that it had never, in fact, attained monopoly power, and that its percentage of the steel business at the time of suit was approximately 41% of the total

*The Government offered no evidence to supplement the showing of uniformity, while top executives of the defendants testified that it was fully explained by ordinary business considerations (R. 422, 425, 710-11, 1708, 1715, 717, 1708-9, 723-5, F. F. 63, R. 3670).

volume (*ibid.*, pp. 438-9, 442). It also appeared that "Competitors * * * followed the Corporation's prices because they made money by the imitation"* (*ibid.*, p. 447).

Both opinions in the District Court (*U. S. v. U. S. Steel Corporation*, 223 Fed. 55, 160, 176 (D. N. J., 1915)) and the opinion in this Court found that these prices had been, since the formation of the Corporation in 1901, the subject of agreements between the Corporation and competitors by means of pools, associations, and finally, the celebrated "Gary Dinners" (251 U. S., pp. 444, 445).

The opinions also found that the last of these various types of agreements had ceased nine months before the Government brought the suit (223 Fed., pp. 161, 176; 251 U. S., p. 445). However, as pointed out by Mr. Justice McKenna, the District Court offered to retain the Government's bill so that if the illegal agreements were resumed they could be restrained.

It will thus be seen that both the District Court and this Court, in the absence of other evidence of price agreement, refused to infer an agreement from mere price uniformity. In this connection, this Court stated (at pp. 447-9):

> "* * * Competitors, it is said, followed the Corporation's prices because they made money by the imitation. Indeed the imitation is urged as an evidence of the Corporation's power. * * *
>
> "* * * the opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics * * *. His deduction was that when prices

*Assuming *arguendo* that conspiracy to fix prices (or clearances) may be deduced as against those whose economic power is great enough to bring about the result, from mere uniformity, it is plain that such uniformity has no significance in the case of a relatively small company which must meet competition in order to survive.

> are constant through a definite period an artificial influence is indicated; if they vary during such a period it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction equivocal of itself even though the facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution."

Later that year in *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U. S. 208, this Court was compelled to appraise with great precision the inference which might be drawn from circumstantial evidence, including (but not limited to) evidence of uniformity of conduct. The basic issue presented in that case was whether the defendant Packing Company had merely exercised its privilege of dealing only with customers who maintained resale prices recommended by it (see *U. S.* v. *Colgate & Co.*, 250 U. S. 300), or had entered into an agreement or combination with its jobbers to maintain such resale prices. The Court's ruling appears from the following extract from its opinion:

> "Among other things the trial court charged:
>
> "'I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent

> from such plan, but actually cooperating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act.'
>
> "The recited facts, standing alone, (there were other pregnant ones) did not suffice to establish an agreement or combination forbidden by the Sherman Act. * * *." (pp. 210-11).

Because of this error in the instruction given by the trial court, this Court affirmed the decision of the Circuit Court of Appeals, reversing the judgment for the plaintiff below.

In *U. S.* v. *International Harvester Co.*, 274 U. S. 693, where the Government petitioned for dissolution of the Harvester Company (doing some 64% of the business in its field) under a consent decree giving the Government "the right to such further relief * * * as shall be necessary to restore * * * competitive conditions and to bring about a situation in harmony with law" (p. 697) in the harvester industry, it appeared that many of the competitors of the Harvester Company had "been accustomed, independently and as a matter of business expediency, to follow approximately the prices at which it has sold its harvesting machines" (p. 708). The Court held, nevertheless, "that competitive conditions have been established in the interstate trade in harvesting machinery bringing about 'a situation in harmony with law'" (p. 710). In so holding, Mr. Justice Sanford, speaking for a unanimous Court, stated (pp. 708-9):

> "* * * the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not estab-

lish any suppression of competition or show any sinister domination."

In *Cement Manufacturers Protective Association, et al.* v. *United States,* 268 U. S. 588, the question was directly posed. There, it was charged that the members of a trade association had combined and conspired to restrain trade by controlling prices and production of cement, through the Association's activities. It appeared, *inter alia,* that, in accordance with its constitution, the Association gathered from its members and promptly reported thereto information with reference to production, price of cement in closed transactions, freight rates from chief points of production, and other matters. It further appeared that there was "a substantial uniformity of price of cement." Variations of price by one manufacturer were "usually promptly followed by like variation throughout the trade. * * * and uniformity * * * resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices by competing sellers" (p. 605). The Government did not charge that there was an agreement on prices among the defendants. Rather the Government contended that the necessary effect of that which defendants had agreed to do was to restrain trade by fixing prices. This was the equivalent, however, of argument that the defendants had entered into a tacit agreement.

This Court refused to so find, reversing the decision of the lower court and stating (per Mr. Justice Stone):

> "* * * this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; and it fails to show any effect on price

and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action" (p. 606).

We respectfully submit, therefore, that the *Cement* case (where, in addition to uniformity of price, closely related concerted action was concededly involved) *a fortiori* establishes that the inference of agreement or understanding may not permissibly be drawn from mere proof that the same prices are charged by competitors.

Decisions of the lower Federal and State courts are in accord with the views expressed in the cases above.

In *U. S.* v. *American Can Co.*, 230 Fed. 859 (D. Md., 1916), the facts were very similar to those in the *Steel* case, *supra*. The Government charged that the American Can Company had been formed and maintained in violation of Sections 1 and 2 of the Sherman Act; that its influence in fixing the price of packers' cans was so great that it dominated the market, and asked that it be dissolved. In refusing the dissolution, the Court noted that, in the cases urged by the Government as precedents, the defendants "had, not long before proceedings against them were instituted, done things which evidenced their continued intent to dominate and restrain trade by the use of methods which interfered * * * with the reasonable freedom of their customers or their competitors" (p. 902). And, dissolution was refused by Judge Rose on the ground, *inter alia*, that "As has been shown, defendant for a number of years past has done nothing of the sort" (p. 902).

Considering the evidence of price similarity between the Can Company and its competitors, the Court said (p. 892):

> "* * * There is no question that since 1901 the defendant [American Can Company] has very largely

> fixed the price at which packers' cans have been sold throughout the United States. It has competitors who now sell approximately one-half the cans which are sold in the country. There is no evidence of any price agreement between it and them. There is no reason to think that there is on this subject any understanding of any kind * * *. Nevertheless, the prices it fixes are the standard prices from ocean to ocean and from the lakes to the gulf, * * * They [competitors] never name their prices for the year until the defendant's have been made public * * *".

So, too, in *U. S.* v. *Standard Oil Co. of N. J.*, 47 F. (2d) 288 (E. D. Mo., 1931), the Court*—in dismissing the Government's petition to prevent a contemplated merger of the Standard Oil Company of New York (Socony) and Vacuum Oil Company (Vacuum), because, assertedly in violation of the old *Standard Oil* decree (221 U. S. 1), which forbade any of the defendants in that case, including Socony and Vacuum "from entering or performing any like combination or conspiracy * * * to restrain commerce * * *"—made the following statement concerning the Government's argument that all the other oil companies in the area in which Socony and Vacuum did most of their business followed the prices for gasoline set by Socony, thus evidencing Socony's power for evil:

> "* * * if the major companies follow the Socony prices in this area, they do so because they do not wish to engage in a price-cutting war which might entail losses to all concerned (including Socony) without any compensating benefits. Such a view has no sinister aspect, but is merely a matter of business judgment and prudence illustrated in every com-

*The opinion was rendered for a unanimous three-Judge Court by Judge Stone.

> munity in the country by retail competitors in all lines. * * * Grocers, butchers and all other lines in the same markets generally sell the same things at the same prices, for the sound reasons that they wish to get all they can, that they cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices. * * *" (pp. 316-317).

The cases dealing with uniformity of conduct in other matters than prices are to a like effect. When explained by similarity in the conditions with which businessmen are faced, no justifiable inference of concerted action is permissible.

Thus, in *Anderson* v. *Shipowners' Association of the Pacific Coast, et al.*, 27 F. (2d) 163 (N. D. Cal., 1928), aff'd 31 F. (2d) 539 (C. C. A. 9th, 1929), cert. den. 279 U. S. 864, plaintiff, a seaman, sued to enjoin the defendant shipowners' associations, their members and agents, from maintaining an alleged combination in restraint of commerce, and to recover damages. It appeared that the two defendant associations had organized an employment bureau through which seamen might be hired for the members. Plaintiff charged, *inter alia*, that the associations fixed the wages paid to seamen employed by all the members, and in support of that contention apparently introduced evidence that all of the defendant shipowners paid similar wages. The District Court, in dismissing this charge, stated:

> "* * * Each member of defendants pays such wages as are necessary in the current economic situation. Similarity of wage scales is due to similarity of conditions, rather than to any agreement among defendants or their members. * * *" (27 F. (2d) 163, 165).

In affirming this conclusion the Circuit Court of Appeals for the Ninth Circuit stated:

> "The allegation in the bill that 'the associations fix the wages which shall be paid the seamen', is wholly unsupported by the record." (31 F. (2d) 539, 542).

Nissen v. *Andres, et al.*, 63 Pac. (2d) 47 (Okla., 1936) is a highly significant State court decision. There, plaintiff, a retail ice dealer, sued defendants, manufacturers and distributors of ice at wholesale and retail, from one of whom plaintiff had obtained ice for a number of years, for damages for alleged destruction of plaintiff's business by defendants pursuant to a conspiracy among them for that purpose. It appeared that the defendant, who had previously supplied plaintiff, became involved in a controversy with plaintiff over plaintiff's methods of competition in retailing ice. It further appeared that, thereafter, all defendants refused to sell ice to plaintiff at wholesale prices, the reasons for the refusals varying slightly but the gist of each being that plaintiff's methods of competition in the retailing of ice were not approved. Plaintiff sold ice at retail, in many instances, at lower prices than defendants. He predicated his claim of conspiracy on the above-mentioned similar refusals of defendants. A judgment for defendants on demurrer to plaintiff's evidence was affirmed, for the reason that (p. 51):

> "While the similarity of the refusals is consistent with a prior agreement to so act in concert, yet it is equally consistent with independent action, since each defendant had ample opportunity to know of the plaintiff's competitive methods, and it was to the interest of each to know and be advised thereof, and in the natural course of business each would ordinarily obtain and have such information without any kind of prior agreement between themselves."

To the same effect is *Commonwealth* v. *Hatfield Coal Co.*, 193 Ky. 229.

These cases make it abundantly clear that mere proof of like or similar action among competitors does not establish a *prima facie* case of conspiracy or agreement.

4. Assuming *arguendo* that runs and clearances were fixed by the large theatre circuits and/or their affiliated producer-distributors, Universal's involuntary acquiescence therein did not implicate it in any such combination and conspiracy.

Let us assume, however, that, as found by the Court below, runs and clearances in the domestic motion picture market were fixed pursuant to combination and conspiracy to restrain interstate commerce among the five major defendants, possessing the best theatres and controlling the best pictures, which the Government claims was also a combination and conspiracy to monopolize, and the consummation of which is alleged to have resulted in actual monopolizing. Or let us assume that the large independent theatre circuits likewise violated the Sherman Act. Under such assumptions, it becomes *a fortiori* true that the clearances granted by Universal must be uniform with those thus fixed and determined by the assumed combinations and conspiracies, if it is to license its pictures at all.

Certainly the existence, as assumed, of combination and conspiracy pursuant to which clearances have been effectively fixed, beyond all power of Universal to change them, does not prevent Universal from exercising its legal right to grant licenses under copyright with a less degree of exclusivity than it is legally entitled to grant. If it has no choice as to this degree of exclusivity, if it is to license its pictures in the best or only available markets, that does not make illegal what is otherwise perfectly legal.

The same arguments which are applicable to the granting of clearances are applicable to the recognition of

theatres as first-run theatres, assuming *arguendo* the existence of a combination and conspiracy among the major defendants or monopolizing by the large independent theatre circuits. As heretofore pointed out, Universal's influence in the designation of such theatres is necessarily negligible. The question is pre-determined for it. Once it is thus pre-determined, such theatres, which have been designated or agreed upon by others as first-run theatres, become, by virtue of that fact, the best, indeed the only first-run, markets for Universal's feature pictures. It either licenses them or not at all.

The governing principles in this connection have been laid down in this Court in *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8, 33-4; *U. S.* v. *Falcone*, 311 U. S. 205, and *Direct Sales Corporation* v. *U. S.*, 319 U. S. 703. Stated in simple terms they are that one may deal with the members of a combination and conspiracy without becoming implicated therein, even though he knows of such combination and conspiracy, provided he does not join mind and hand therein and thus cooperate with the co-conspirators. To license one's feature pictures in the best or only available markets under the only conditions possible in respect of runs, clearances and admission prices, and to grant restrictive and less than exclusive licenses under copyright in connection therewith, which are legal *per se*, is not to join mind and hand in any combination and conspiracy which may be in existence among one's customers.

If, as assumed *arguendo*, a combination and conspiracy to monopolize* and restrain interstate commerce was being

*The Government contends that there was a combination and conspiracy to monopolize, which resulted in actual monopolizing, as well as a combination and conspiracy to restrain trade, which the Court below found. While finding an attempt to monopolize it refused to find that there was a combination and conspiracy to monopolize or any actual monopolizing.

carried on by the major defendants, or large independent theatre chains, pursuant to which priority in runs, clearances and admission prices were fixed in the domestic motion picture theatre market, the Government's duty was to break up such combination and conspiracy, and to restore competitive conditions so that licensors under copyright would not be compelled to accede in respect of such matters as runs, clearances and admission prices, to conditions determined by the co-conspirators.

As heretofore pointed out, the sole contentions made by the Government, upon which it bases its conclusion that the non-theatre-owning defendants were implicated in such assumed combinations and conspiracies are (1) that they sold their feature pictures in the best or only available markets, which to a great extent were controlled by such large theatre circuits, and (2) that the provisions in their licenses, even if assumed to be legal, "maintained" the run, clearance and admission prices fixed by such large theatre circuits in the course of such combinations and conspiracies, and are more favorable to them in some other respects than licenses made with independent theatres having small buying power (Gov. Juris. St., p. 8).

For the reasons above set forth such non-theatre-owning defendants had the right to sell in the best or only available markets, and are not to be implicated in any combination and conspiracy or any monopolizing, carried on by others to dominate such markets, merely because they exercised their legal rights to make restrictive and less than exclusive licenses under copyright, which necessarily accepted the runs, clearances and admission prices assumed to have been fixed by such theatre chains. Nor because the great buying-power of such theatre chains may have obtained for them better terms in certain respects than were obtainable by the small independent theatre.

5. Supporting authorities.

In the last analysis the case against Universal (assuming the validity of its restrictive and exclusive licenses under copyright, which we believe we have clearly demonstrated), depends, as the Government admits (Gov. Juris. St., pp. 7-8), upon two contentions: (1) that it licensed its feature pictures to a greater extent* on prior runs to the large theatre circuits than to independent theatres, on the basis of the admission prices which they currently charged, and (2) that in order to successfully compete with the major and other distributors, it had to grant clearances as great as those granted by the major distributors, and thus to license on much the same clearance basis.**

On the foregoing basis the Government seeks to put Universal in the same basket with the major defendants and large independent chains. It is plain, however, that Universal merely accepted the market as it found it, having no power to change it. Naturally, the theatres affiliated with the major defendants and large independent chains were on the whole the best, when not the only available, prior-run markets for its pictures (R. 1697-1700), if the Government's charge that these circuits dominated the industry is true. It is preposterous to suggest that Universal, a relatively small distributor without theatres, could alter their pre-determined admission prices. As respects clearance, it is in no different position from one who follows a price-leader which dominates an industry. That the com-

*According to GX 425 Universal received 42.1% of its feature film rentals from the five major defendants, 2.4% from the five independent theatre chains paying it the next highest rentals, and 55.5% from other theatres.

**Clearances granted by distributors to independent theatres exhibited like uniformity.

petitive necessity which impels a smaller competitor to meet the terms of the dominant factor in the industry results in no combination and conspiracy on his part is excellently demonstrated in the recent decision of the Circuit Court of Appeals for the Seventh Circuit in *Aetna Portland Cement Co. et al.*, v. *Federal Trade Commission*, 157 F. (2d) 553.

In that case the Commission had found a combination and conspiracy among 74 cement companies, made effective by the employment of a multiple basing-point system of pricing, resulting in the quoting of an identical delivered price by all producers who sought business at a given destination.

In reversing the Commission's order, the Court spoke in part as follows (p. 564):

> "We would think that in all forms of industry, particularly those of great magnitude, irrespective of the pricing system employed, that there would be found price leaders and price followers. We would suppose further that the leaders are those who occupy a commanding position, perhaps because of their size and strength, and that the followers would be those of less vitality. It may be a fact, we suspect that it is, that a price follower does not become such of his own free choice but that he is forced into such a position by a larger and perhaps dominating competitor. And it may also be a fact, again we suspect that it is, that in many instances those who are capable of exercising price leadership impose upon their less fortunate competitors. If such be the case, however, we do not see how this could create any inference of conspiracy or concerted action between the two groups, and neither do we see how it has any bearing upon the pricing system under attack."

It likewise pointed out that when one cement mill had a freight advantage over another cement mill distantly

located, as it would have in its adjacent territory, the more distantly located cement mill would have to absorb the difference in freight if it were to sell in its competitor's adjacent territory. On this subject it said (p. 557):

> "* * * Thus these two competing mills are faced with a simple business proposition which can be solved in one of two ways, as their individual judgment may dictate. Each can confine its sales to the territory in which it has an advantage or can extend its business into the territory of the other. If they follow the former course, as the Commission would require them to do by its order, each will have a monopoly in its own territory and competition will be at an end. On the other hand, if the other course is pursued and they go into the territory where they are at a disadvantage freightwise, they necessarily must meet the price which they find there in order to sell. To enable them to do this, they absorb an amount of freight necessary to enable them to meet the price which they find. The same necessity which impels them to do this requires a reduction in their mill net in an amount equivalent to the freight which has been absorbed.
>
> Under the decision of the Supreme Court in the old Cement case (see also *Maple Flooring Mfrs. Assn.* v. *United States*, 268 U. S. 563), this pricing method employed by Mills A and C is not in restraint of competition, even though it results in uniformity of price at each destination."

Referring to the old *Cement* case (*Cement Manufacturer's Protective Association* v. *U. S.*, 268 U. S. 588), the Court quoted therefrom as follows, p. 598:

> "* * * When a manufacturer establishes his factory at a given point of production and sells his product in a territory which is contiguous freightwise to his factory, other mills established in the vicinity and serving the same territory, *in order to compete in*

> *that territory* (italics ours) * * must sell at a mill price which will permit them to deliver cement at a price which will enable them to compete with the mill or mills located at the basing point * *."

The same considerations obviously apply with respect to the acceptance of clearances, which Universal, by reason of its position in the industry, can have no real influence in determining. It must meet competition or not do business.

Nor can it be properly argued that the large amount of business done by Universal with the theatres affiliated with the major defendants and with the large independent chains should be given any weight in determining whether Universal was implicated in any combinations or conspiracies engaged in by them.

In *U. S. v. Bausch & Lomb Optical Company*, 321 U. S. 707, an exclusive relationship, not merely a good-customer relationship, between a supplier and user, was held to be free from objection, by an equally divided vote of this Court. In that case the supplier, Bausch & Lomb, had agreed with the user, Soft-Lite, to an exclusive-dealing arrangement in respect of pink-tinted lenses for eyeglasses. Soft-Lite was found to have engaged in an unlawful combination and conspiracy with its wholesalers and retailers, and to have fixed the prices charged by them for such lenses.

The exclusive-dealing arrangement had been made in 1924, and the relations between Bausch & Lomb and Soft-Lite had been close and intimate for twenty years. As disclosed in the opinion, Bausch & Lomb, through stock control, dominated a number of the wholesalers who had participated in the combination and conspiracy with Soft-Lite. Bausch & Lomb thus profited in two ways from the Soft-Lite business, first from profits made by manufacturing and selling to Soft-Lite, and second by sharing

through stock ownership in wholesale distributors of Soft-Lite's goods in the profits which lay between the Soft-Lite selling price and the consumer purchase price (pp. 711, 713-4).

Bausch & Lomb "concerned itself with prices charged to wholesalers by Soft-Lite, discussed each step of the price mark-up from Soft-Lite up to the consumer, insisted that reductions in its prices to Soft-Lite should be passed along the distribution line, and through its affiliated corporations cooperated in the price arrangements and the elimination of undesirable retailers" (p. 714).

Despite all this, Bausch & Lomb was exonerated, even though it was tied to Soft-Lite by an exclusive-dealing arrangement.

Universal's relationship to the major defendants and large circuits, on the other hand, is merely that of one of their many suppliers. They were its customers, nothing more.

VI.

IF THE MAJOR DEFENDANTS, OR LARGE CHAINS OF INDEPENDENT THEATRES, ALLEGED BY THE GOVERNMENT TO HAVE COMBINED AND CONSPIRED TO MONOPOLIZE AND RESTRAIN INTERSTATE COMMERCE, EMPLOYED LONG-TERM LICENSE CONTRACTS OBTAINED FROM A NON-INTEGRATED DISTRIBUTOR SUCH AS UNIVERSAL, FOR ALL ITS FEATURE PICTURES, TO BE SHOWN IN ALL THEIR THEATRES, TO EFFECTUATE SUCH COMBINATIONS AND CONSPIRACIES, THE REMEDY IS TO ENJOIN SUCH THEATRE CHAINS FROM ENFORCING SUCH CONTRACTS, NOT INJUNCTION AGAINST THE GRANTOR THEREOF, WHICH DID NOTHING MORE THAN DEAL WITH THE BEST OR ONLY AVAILABLE CUSTOMERS ON A WHOLESALE BASIS.

If this Court sustains the decree of the Court below enjoining Universal, the decree as affirmed will constitute

prima facie evidence of violation of the Sherman Act in treble damage suits. (Title 15, U. S. C., Sec. 16, 38 Stat. 731.) Such treble damage suits by independent exhibitors already run into many millions of dollars, and an affirmance by this Court would undoubtedly multiply them many times.

Yet as heretofore shown, the case against Universal (aside from the legality of its licensing practices *per se* which we think to be clear) rests exclusively upon the fact that it unavoidably did a high proportion of its business with the prior-run theatres of the major defendants, and the large independent theatre circuits, which were its best, when not, as was very frequently the case, its only available markets, and the further fact that it necessarily had to deal with them on the basis of the admission prices and clearances determined by them, independently or in concert, if it were to license its feature pictures at all.

1. Franchises with theatre chains.

The Government claims that contracts, pursuant to which the feature pictures of a non-integrated distributor such as Universal are committed, sometimes for a term of years, to a major theatre chain, or to a large independent circuit, are *per se* in violation of the Sherman Act, because of their potentialities for abuse by the licensee.* For

*Examination of such Universal contracts of this type as are in evidence discloses that they specify film rental terms, or provide for their specification, in each individual theatre situation, and do not contain that provision which the Government particularly objected to in *U. S.* v. *Griffith Amusement Co.*, 68 F. Supp. 180, i.e. the privilege of playing features out of the order of release. G. X. 198, G. X. 259-263, G. X. 384, G. X. 470, G. X. 473.

The characterizations by the Government, in the index to its Appendix, of certain provisions of these contracts as "arbitrary", when lacking adequate explanation, are themselves arbitrary.

example, it is said that the film rental can be allocated among the various theatres of the licensee chain so as to permit its theatres in the weakest competitive position to more strongly compete with their competitors, i.e., by allocating relatively small film rentals to them and larger film rentals to those theatres in the chain which are in better competitive position. This, of course, is nothing but a matter of bookkeeping. It is also said that the licensee chain can distribute the feature pictures around among its theatres in the most advantageous way to meet the competition of independent theatres.

Since it is plain that such franchises to single independent theatres are legal (pp. 95-99, *ante*), the only objection thereto can be that they are made with exhibitors operating a great many theatres. But what such a licensee can do is nothing more than any large integrated business, with many operating units, can do, *vis a vis* small competitors, with operating assets supplied it under output, requirements or other long-term supply agreements by distributors. The fault is not with the suppliers, who have to do business in the markets as they exist, and thereby secure good outlets for their pictures for at least a brief term of years,* but plainly lies in the abuse of power by great business combinations making wrongful use of the operating assets supplied them. The supplier does not have to determine at its peril whether or not it is dealing with lawbreakers, i.e., monopolists. *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 33-4, *U. S.* v. *Falcone*, 311 U. S. 205. He restrains noobody by dealing with them, for the only restraint is in the exclusivity of the franchise contracts, which, as we have shown, is analogous to the reasonable

*Cf. this with the permanent outlets possessed by the major defendants for their pictures.

restraint inherent in exclusive-dealing contracts, and in any event is entirely proper in respect of licensing under copyrights.

If, as charged by the Government, the five major defendants, or large independent chains, were engaged in combinations and conspiracies to monopolize and restrain interstate commerce, and, in the course of effectuating such conspiracies, they made use of long-term contracts obtained from non-integrated distributors, such arrangements should be terminated by injunction against the conspiring licensees, but not against the licensors, unless they were in fact members of such combination and conspiracy, i.e., "joined mind and hand" therein. The mere making of such wholesale contracts, which were made with all types of licensees, by no means makes them such. They must take the market as they find it, even though they might well prefer to deal theatre by theatre, in that they might well obtain larger revenue in this way by dealing with licensees with less buying-power.

That there is not the slightest necessity to restrain the non-theatre-owning distributor, in order to abrogate illegally-used contracts, is to be seen from the decision of this Court in *U. S.* v. *Crescent Amusement Company*, 323 U. S. 173. In that case the complaint had charged a group of exhibitors who operated a chain or chains of theatres, together with the 8 largest distributors, with a combination and conspiracy to violate the Sherman Act. In the Court below the five major distributors were dismissed after the Consent Decree in this case was entered in 1940 (p. 176). Of the other three distributors the Court found that only one had violated the Sherman Act, and this was not Universal (p. 176). Only the exhibitors and three individual defendants appealed. The five major distributors who had

been dismissed, and the distributor found to be implicated in the conspiracy, were necessarily treated by this Court as alleged co-conspirators, they having become non-defendants against whom no injunction could issue.

The use of franchises, i.e., long-term contracts, in competitive warfare against independent exhibitors by the combination of exhibitors was one of the principal elements in the case. After pointing out that the District Court found that some of the distributors (not including Universal) were co-conspirators on certain phases of the program (p. 183), this Court put that circumstance to one side, stating that it was immaterial whether or not the distributors technically were or were not members of the conspiracy, in view of the fact that it found a conspiracy to monopolize and restrain interstate commerce among the exhibitors. It was argued by the appellants that the injunction directed by the Court below against franchises should be directed against the distributors. This Court, however, upheld the injunction in respect of franchises against the exhibitors, and thus abrogated existing franchises, although it could not in the posture of the case issue any injunction against the non-defendant major distributors who had granted the franchises. It expressly conceded that franchises might be lawfully used (p. 188).

If, therefore, there was illegality in the manner in which the long-term contracts granted by Universal were employed by the major defendant licensees or large independent theatre chains, it was due to monopoly which the Government through inaction has suffered to exist, not to the normal every-day business action of Universal in making wholesale deals with such aggregations of theatres on the only basis open to it.

2. Alleged discriminations contained in such franchises.

A monopolistic combination is, of course, by reason of its power, in a position to secure more favorable contracts from distributors or suppliers than smaller businesses may be able to obtain. If, in order to license or sell their products, such distributors or suppliers have to give way before such superior bargaining power, to a certain extent, this does not make them participants in the illegal activities of the buyers or licensees. No such thing, we are confident, was held by this Court in the *Interstate Circuit* case, and in citing this case and the *Crescent* case for the general proposition that any "discriminating contract constitutes a conspiracy between the licensor and licensee" (R. 3550), the Court below went far afield. Indeed, since a licensor under copyright, in granting an exclusive license, very emphatically discriminates—and does so legally, it is difficult to understand how anything can be made out of far less important provisions which are allegedly discriminatory.

In dealing with great numbers of licensees, whose buying power greatly varies, and whose businesses are differently situated, it is certainly impossible to treat them all exactly alike in respect of each term of the contract. Their situations are different, and some insist upon privileges in which others may or may not be interested. In any event the superior bargaining power of a large unit can be expected to enable it to obtain favorable treatment.

Despite these rather obvious considerations, the court below in its Opinion (R. 3549-51) attached considerable importance to what it termed discriminatory provisions in the licenses made by Universal with the large theatre chains. Relying exclusively upon testimony (R. 1432-3) given by Lazarus, United Artists' sales-manager, concerning its practices, the Court improperly concluded, without any evi-

dence to support it, that Universal's practices were the same. Even as to United Artists the testimony was not all to the effect stated by the Court. All Lazarus said was that generally speaking his company "wrote up" the deal on the standard form of agreement when dealing with small independents. The Court concluded from this that provisions, favorable to the large theatre chains, were written into the contracts with them because certain clauses were made part of such contracts. It overlooked the fact that the standard contract is always part of the contracts with the large theatre chains also, as the very exhibits it cites show (R. 3549-50). It further overlooked the fact that when a distributor "wrote up" a contract on its standard form, it could easily add by riders or interlineation any clause agreed upon between the parties, and this was in fact customary (R. 1471).

Thus there is no proof that Universal denied any of the privileges relied upon to any small independent. There is affirmative proof, on the contrary, that it granted those in which independents were interested. Indeed, the very standard contracts, upon which the Court relies as excluding them, actually grant a number of these privileges, to wit, the right to exclude foreigns, G. X. 289, clause Eighth (2)(b), the exclusion of pictures of outside independent producers, G. X. 290, clause Twentieth, and large privileges in the elimination of films, G. X. 289, clause Fifteenth; G. X. 290, clause Fourteenth. Moreover, Scully, Universal's sales-manager, testified that substantial selection and elimination privileges were granted alike to affiliated and independent theatres (R. 1469-71).

Of the exhibits cited by the Court only seven have to do with Universal (G. X. 259, 260, 262, 263, 384, 470, 473). None grant the right to change the bracket in which a picture has been placed by Universal. None grant "unlimited

playing time". None grant "extended playing time", though a few appear to recognize its existence. "Extended playing time" simply means that when a picture has done well for the period originally licensed, the exhibitor is permitted to continue to exhibit it for an additional period on payment of an additional agreed film rental. It is wholly incorrect to suggest that this right is not freely granted to small independent exhibitors, formally or informally, as with film rental concessions (R. 1273).

There remain out of the "discriminations" found by the Court only a few which are of no interest to the small exhibitor. Permission to deduct for double-bills, as an examination of the exhibits cited by the Court will show, is granted only in respect of percentage deals. Dealings with small independents are almost always on a flat rental basis.

Universal's standard contract is drawn for use with 18,000 theatres, few of which can qualify as top houses suitable for road-shows at advanced admission prices. In any event Universal has released no road-shows. Hence the road-show priority clause proves nothing as to it.

The right to move over a picture from one theatre to another is of very limited application, inasmuch as few situations present the proper opportunity for a continued first-run in a smaller but suitable first-run theatre. Obviously only an exhibitor with more than one first-run theatre could avail itself of the opportunity, which, in any event, a distributor has the full right to grant to whomever it pleases. The right to make up in another theatre a deficiency in playing flat rental pictures by playing the pictures not played in the first theatre in some other theatre in the same Exchange area, likewise is of interest only to chains. The eight weeks' suspension clause is something which Universal insists on having to get its pictures free from a closed theatre.

Finally it is to be said that if in fact some licensees received more favorable terms in some respects than others who also wanted them did, of which there is no evidence, it does not appear that they were not paid for in increased film rental. It does appear, however, that the non-theatre-owning distributor is very liberal in making adjustments in film rental with the independent exhibitor, giving him much more leeway in this respect than is given to affiliated exhibitors (R. 1273). There is nothing to show that the independent exhibitor is not satisfied with such adjustments, or that he wants anything more.

In any event, it is no violation of the Sherman Law for a distributor to *independently* grant more favorable terms to one buyer than to another. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 605; *Terminal Warehouse Co.* v. *Penn R. R. Co.*, 297 U. S. 500, 511, 515. The Robinson-Patman Act applies only to discrimination in price in the sale of commodities of like grade and quality, having a specified restrictive effect upon competition. (Title 15, Sec. 13 *et seq.*, U. S. C. A.) *A fortiori*, a copyright proprietor does not have to treat all licensees alike.* *Buck* v. *Hillsgrove*, 17 Fed. Supp. 643 (D. Ct. R. I. 1937); *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424 (C. C. A. 7, 1903); *Dr. Miles Medical Co.* v. *Platt*, 142 Fed. 606 (N. D. Ill., 1906).

The Court below apparently came to this conclusion ultimately, for it did not enjoin what it had condemned in its conclusions of law (R. 3692, C. L. 8d). Moreover, it expressly found that the evidence was insufficient to justify a conclusion that there had been any discrimination in

*Especially is this true of motion picture theatres which differ greatly in their characteristics.

respect of film rentals, clearances or minimum admission prices, which as it pointed out were the alleged discriminations "especially" relied upon by the Government. (R. 3550-1).

If the law were otherwise than as above argued, every supplier who made a wholesale or long-term exclusive-dealing contract with a large user would do so at the peril of being implicated in a violation of the Sherman Law, by reason of the potential or actual ability of the user to capitalize upon the contract to the disadvantage of its smaller competitors. Obviously this cannot be the law. Obviously the task of policing monopoly is the Government's, not the small business man's, since the latter, in order to live, must frequently deal with monopolies, if the Government permits them to exist.

Part Three

THE REMEDY PRESCRIBED BY THE DECREE DEPARTS IN A NUMBER OF RESPECTS FROM WELL-ESTABLISHED LEGAL PRINCIPLES, AND IN IMPOSING A MANDATORY SYSTEM OF COMPETITIVE BIDDING, REGULATING IN DETAIL THE OPERATIONS OF NON-THEATRE-OWNING DISTRIBUTORS WHO ARE NOT PUBLIC UTILITIES, IS UNAUTHORIZED BY STATUTE AND UNCONSTITUTIONAL, IN THAT IT CONSTITUTES A JUDICIAL USURPATION OF LEGISLATIVE POWER.

Universal contends that on the whole of the evidence it is entitled to a decree of dismissal. It contends that the injunctive provisions of any decree to be entered herein should run only against those who are found upon adequate evidence to have joined mind and hand and cooperated in any combination and conspiracy to restrain interstate commerce which may have existed, and not extended to those who dealt therewith on the only terms possible. It further contends that under no circumstances, whatever its findings, was the Court below entitled to prescribe a system of competitive bidding, regulating in detail the operations of non-theatre-owning distributors which are not public utilities.

In imposing such a system of competitive bidding the Court does not act judicially but administratively, and thereby usurps the legislative power. It is authorized neither by statute nor, we submit, by the Constitution to act, so as to minutely regulate and in detail supervise the everyday business operations of a distributor, carried on in a lawful manner, and is moreover ill-equipped and unfitted to so act to supervise *in perpetuo* the detailed operations of a far-flung industry. Only an administrative body which can

issue *quasi*-legislative rules and regulations can possibly possess the necessary personnel and expert familiarity with the industry to properly administer such a task, if anyone could. We know of no case in which anything like it has been attempted by a court.

Other less important provisions of the decree require revision, assuming that any injunctive provisions in respect of minimum admission prices, clearances, franchises, master agreements and block-booking are proper as against Universal, which Universal, of course, denies.

As to the minimum admission prices, although the opinion and findings of fact seemingly do not condemn the mere granting of a license in which minimum admission prices are specified, the decree does so (II, sub-div. 1, R. 3695). That which is apparently condemned by the Opinion and by the Findings of Fact is engaging in a system, pursuant to which minimum admission prices are fixed (F. F. 62-73, R. 3670-3).

Likewise in respect of clearance, although the findings of fact approve the institution of clearance (F. F. 78, R. 3674), Universal is forbidden "to maintain a system of clearances" with any exhibitors (II, sub-div. 2, R. 3695). If Universal grants more than one license, and it must necessarily grant thousands, it will certainly be accused under this provision of maintaining a "system of clearances" with exhibitors. Yet it is difficult to understand what illegality there would be therein, if the individual clearances are legal.

The burden of proof of sustaining the validity of any clearance provision, when attacked, is placed upon Universal. Yet the test of the validity of the clearance is whether it is "in excess of what is reasonably necessary

to protect the licensee in the run granted", a matter which is exclusively the concern of theatre operators, and of which Universal obviously can have no direct knowledge (II, sub-div. 4, R. 3695-6). It is moreover absurd to place this burden upon a non-integrated distributor which has no power to do anything but deal with the market on the terms which the market is willing to accept.

Universal is enjoined from performing any existing franchises and from making any franchises in the future, even with small independent exhibitors (II, sub-div. 5, R. 3696). As heretofore pointed out, such franchises are not only legally unobjectionable, but are plainly anti-monopolistic. A "franchise", moreover, is defined without reference to the exclusivity of the arrangement. In other words, any commitment of Universal's pictures for more than one year, would, under this definition, be a "franchise", even if completely non-exclusive. This condemns any non-exclusive license for a term of years, an everyday institution in the patent law at least. Universal is thus deprived of the elementary right to maintain "show-windows" so necessary for the proper exploitation of its pictures, and freely permitted to the major defendants (Decree, V, R. 3700).

Likewise, in the case of master agreements, Universal is enjoined from making the same, even with small groups of independent exhibitors (II, sub-div. 6, R. 3696). It is further enjoined from making or further performing any formula deals, although the only findings of the Court relating to formula deals were in respect of RKO and Paramount (F. F. 86, R. 3675).

The provision of the decree relating to "block-booking" assumes that all deals in which a number of features are sold at the same time are infected with the vice of conditioning,

which is obviously not a fact, and requires that in all such cases, in which features have not been "trade-shown" prior to the granting of the license, the licensee shall be given the right to reject 20% thereof. This in the face of the fact that Universal presently grants to its licensees the right to reject a considerable number of such features, whether or not there has been any conditioning (R. 1468-71).

VII.

THE IMPOSITION OF A SYSTEM OF COMPETITIVE BIDDING, REGULATING IN DETAIL THE OPERATIONS OF NON-THEATRE-OWNING DISTRIBUTORS, WHICH ARE NOT PUBLIC UTILITIES, IF NECESSARY IN THE PUBLIC INTEREST, IS A MATTER FOR CONGRESS, OR AN ADMINISTRATIVE TRIBUNAL CREATED THEREBY, NOT THE COURTS. THE RECOGNIZED JUDICIAL SANCTIONS TO RESTORE COMPETITIVE CONDITIONS IN A SHERMAN ACT CASE ARE TO ENJOIN UNREASONABLE RESTRAINTS OF TRADE AND TO DISSOLVE MONOPOLIES OR MONOPOLISTIC COMBINATIONS.

One of the Government's assignments of error—No. 10—reads as follows:

> "The Court erred in decreeing competitive bidding as appropriate relief in situations where the defendants' theatres were in competition with independent theatres."

This is a direct attack upon the legality of the competitive bidding relief granted in the decree, since it goes to the heart of the Government's basic contention in the case that affiliated theatres were favored by distributors over independent theatres.

If, as found by the Court below, prior runs, clearances and admission prices in the important domestic motion pic-

ture theatres were fixed by combination and conspiracy, the proper remedy was to restrain and prohibit the continuance thereof by appropriate means. Instead, the Court resorted to a hitherto unheard-of form of relief, when it imposed a mandatory system of competitive bidding to regulate in detail the operations of distributors who are not public utilities.

It seems to us plain that such a remedy, if appropriate at all in the circumstances, is exclusively for the determination of Congress, which, if it sees fit, can create an administrative agency to govern the industry through *quasi*-legislative rules and regulations. The judicial power, we think it is clear, does not extend to such manner of relief, through which the operations of a non-public utility industry are closely regulated *in perpetuo* without Congressional sanction.*

Instead of forbidding the defendants to continue the use of practices found to be illegal, and/or employing the remedy of dissolution, insofar as appropriate, the Court forbade the defendant-distributors to license their pictures (except in the case of a major defendant licensing its pictures to its own theatres), "in any manner except" as prescribed.

The gist of the prescription, as applied to Universal, is (1) that it must offer to license every theatre which

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*In *Hartford Empire Co.* v. *United States*, 323 U. S. 386, this Court struck down the lower court's prohibition against dealing with patented machinery in any way but sale, and restored the right to license and lease. At page 409, after discussing the broad range of relief available to control Sherman Act violations, it said:

> "But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, in a different class than other people."

desires to exhibit a feature picture distributed by it upon some run and upon uniform terms, and (2) that, when Universal desires to select a particular theatre for exclusive license on a particular run, it must award such license after competitive bidding conducted in accordance with certain detailed specifications in the Decree, and must base the award solely upon the considerations set forth in the Decree, to the exclusion of all other considerations, however important to the distributor.

The specific restrictions contained in the Decree as to the methods of licensing to be employed are as follows:

1. The distributor must offer to license for a flat rental as distinguished from a percentage of the gross receipts;

2. The distributor must specify, in advance, the number of days for the exhibition to be licensed, and the time when the exhibition is to commence;

3. The distributor must specify precisely when the picture will become available;

4. The distributor must specify the clearance, if any, which it is willing to grant; and

5. The exhibitor's counter-offer must specify: (a) the run he desires to have; (b) the rental he will pay, either as a flat rental, or a percentage of the gross receipts or both, or any other form of rental; (c) the clearance the exhibitor is willing to accept; (d) the playing time the exhibitor desires to have; and (e) any other offers which the exhibitor cares to make.

The distributor is permitted to reject all offers, but is required, in the event he accepts any, to grant the license

upon the run bid for "to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor".

Under this prescribed system of competitive bidding, the primary duty of the distributor, after he has satisfied himself that a theatre is of the "size, location and equipment adequate to yield a reasonable return" to him, is to determine the highest responsible bidder. But under the system prescribed such distributor will necessarily be confronted with various bids having no common denominator, in that some may be flat bids, some percentage of gross receipts bids, some a combination of both, and some in other forms of rental. The distributor, therefore, must determine, on peril of being held in contempt, who is the "highest responsible bidder". Yet, it is plain that he will be unable to do so.

Even, however, were the bids such that the distributor could determine who was the highest responsible bidder, the objective considerations prescribed in the Decree fall far short of being adequate to protect the legitimate interests of a distributor.

In the Consent Decree negotiated between the Government and the five major defendants (Article X, R. 3384-5), an arbitrator, in adjudicating upon the propriety of a refusal to license, is required to take into consideration, among other things, the following factors, and to accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

> "The terms, if any, offered in respect of each of the two competing theatres; the seating capacity of each of said theatres; the capacity of each for producing revenue for the distributor; the character,

appearance and condition of each, including its furnishings, equipment and conveniences; the location of each of said theatres; the character and extent of the area and population each serves; the competitive conditions in the area in which they are located; their comparative suitability for exhibition of the distributor's features on the run requested; the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty and fair dealing; the policy under which each of the theatres has been operated and the policy under which the complainant proposes to operate his said theatre if he obtains the run requested; the financial responsibility of the exhibitor operating each of said theatres; and the distributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom."

Among the very important factors omitted from the final Decree are:

1. Comparative suitability of the competing theatres for the exhibition of the distributor's features on the run requested;

2. Character and ability of the exhibitor operating each of the competing theatres, and their respective reputations generally in the industry and in the community for showmanship, honesty and fair dealing;

3. The policy under which each of the competing theatres has been operating, and the policy under which they respectively propose to operate if the run requested is obtained;

4. The distributor's prior relations with each of the competing theatres involved, and with their owners and operators, and any equities arising therefrom;

5. Competitive conditions in the area in which the competing theatres are located;

6. Character and extent of the area and population which each of the competing theatres serve.

In other respects the system decreed is unworkable. It is, for example, wholly impractical for either a distributor or exhibitor to determine, at the time of the licensing, exactly how long a picture shall be run without any leeway for extended runs. This for the reason that public demand determines the length of the run. Yet under the licensing system prestribed no leeway is possible, because competing bids must necessarily be compared on the basis of the same playing time. If bids should be made for different playing times, it would not be possible to compare them, since, as in the case of film rental, there would be no common denominator. For example, one bid might be for 5 successive weekdays, another might be for 3 successive week-days followed by Saturday and Sunday, and still a third might be for 4 week-days and a holiday. Since attendance is ordinarily far greater on Saturdays, Sundays and holidays, any strict comparison of the bids would be impossible.

Nor is it possible, as a practical matter, for a distributor, when licensing a picture, to contract to make it available at a specified time. The exchanges of the defendant-distributors are and must be run like circulating libraries, in the operation of which it is impossible to determine just when an exhibitor will complete a run and return a print to the

booking office. Everything depends upon public demand in particular theatres to see the picture.

The foregoing clearly indicates that a wholly unworkable system of administrative regulation is imposed upon Universal by the judicial arm of the Government, which we submit is not authorized to so act, either by statute or under the Constitution.

An equity decree in a Sherman Anti-Trust proceeding should be confined to its legitimate purpose, i.e., "to suppress the unlawful practices and to take such reasonable measures as will preclude their revival". *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 426, p. 461. The Sherman Act does not confer legislative or administrative powers on the Courts, but confers jurisdiction only to "prevent and restrain" violations of the Act. Under well-established law this includes the dissolution of monopolies or monopolistic combinations*—*Northern Securities Co.* v. *U. S.*, 193 U. S. 197; *Standard Oil* v. *U. S.*, 221 U. S. 1; *U. S.* v. *American Tobacco Co.*, 221 U. S. 106; *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *U. S.* v. *Reading Co.*, 253 U. S. 26; *U. S.* v. *Lehigh Valley R. R. Co.*, 254 U. S. 155; *U. S.* v. *Southern Pacific Co.*, 259 U. S. 214. There is no authorization to impose a comprehensive regulatory system upon a non-public utility such as Universal, thereby putting it in a perpetual straight jacket. On the contrary the Act intended that decrees thereunder should be directed solely to the end of restoring free competition.**

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*The reasons are stated by Judge Learned Hand in *U. S.* v. *Corn Products Refining Co.*, 234 Fed. 964, 1018.

**"One of the fundamental purposes of the statute is to protect, not to destroy, rights of property". *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 78. Yet here we are stripped of our rights under copyright in a manner analogous to that which was disapproved by this Court in respect of patents in *Hartford Empire Co.* v. *U. S.*, 323 U. S. 386.

The clearly legislative nature of such affirmative prescriptions has been pointed out in a number of cases reaching this Court, among them *A. T. & S. Railroad* v. *D. & N. O. Railroad*, 110 U. S. 667, 675, 686; *U. S.* v. *New York Coffee and Sugar Exchange Inc.*, 263 U. S. 611, 621; and *Daniels et al.* v. *Portland Gold Mining Co. et al.*, 202 Fed. 637, 639, 641, cert. den. 229 U. S. 611. In all of these cases it was expressly held that the prescription of rules and regulations to govern the carrying on of private businesses, in order to correct abuses therein, was the prerogative of the legislature under the police power, and not that of the courts in exercising equity powers.

More recently a relatively mild attempt to place a non-public utility industry in the straight-jacket of judicial regulation has been repulsed by this Court. *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707. In that case the Soft-Lite Lens Company Inc., had been found guilty of violating the Sherman Act, and an injunction had issued against it. Upon appeal the Government asked the inclusion of a requirement that Soft-Lite file with the District Court "a written instrument providing that it will sell its product, without discrimination, to any person offering to pay cash therefor". Pointing out that Soft-Lite deals in a specialty of a luxury or near-luxury character, and that the right to select its customers might well be the most essential factor in the maintenance of the highest standards of service, this Court refused the Government's request, saying at p. 728: "Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices". Among the cases relied on by this Court was *U. S.* v. *Colgate & Co.*, 250 U. S. 300, p. 307, wherein it was unanimously held that "The (Sherman) Act does not restrict the long recognized

right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal". Yet here we are forbidden to deal with our oldest customers or others whom we may rightly regard as our best ones.*

If the right to select customers cannot be denied to one engaged in the business of selling lenses for eye glasses, it certainly ought not to be denied to one engaged in the business of licensing feature motion pictures, costing from hundreds of thousands up to millions of dollars to produce, wherein the relations between distributor and exhibitor are of the highest importance, in view of the peculiarly specialized nature of the business, and the great importance of proper exploitation.

CONCLUSION

A judgment dismissing the complaint as against each of the Universal appellants, should, we submit, be entered, or, in the alternative, the decree should be modified as to them in the respects herein suggested.

Respectfully submitted,

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*Other cases in this Court recognizing the inviolability of such rights are *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 565, 573; *Same* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 452-3; *Same* v. *Sinclair Refining Co.*, 261 U. S. 463, 475-6; *Same* v. *Curtis Publishing Co.*, 260 U. S. 568, 582.